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No.

In the
Supreme Court of the United States

E.S.H.,

Petitioner,

v.

K.D. AND S.L.C.,

Respondents.

On Petition for Writ of Certiorari to the Superior Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Eric S. Harner (hereinafter E.S.H. or Father) and Karen Harner (hereinafter Mother) were married, had a daughter, O.H., and separated three years later. Upon separation, Father and Mother enjoyed shared legal custody: Mother enjoyed primary physical custody, and Father exercised partial custody every three out of four weekends per month. Mother met, cohabitated with and eventually married Kent Deeter (hereinafter K.D.). O.H. lived with K.D., a legal stranger, for only two years and three months before her mother died. When Mother died, Father assumed sole legal and physical custody of his daughter, O.H. Although a legal stranger, K.D. petitioned for and was granted shared legal custody and primary physical custody of O.H. over Father's strong and continuous objections. This case presents the following questions:

1. Whether a court violates the Fourteenth Amendment to the United States Constitution when it denies a fit parent his fundamental right to parent his child without first establishing a compelling state interest and then only effectuating that interest by a narrowly tailored means.

2. Whether Pennsylvania's *in loco parentis* doctrine, permitting any legal stranger to seek legal custody of a child, over the parents' objections, violates parents' constitutional right to raise their children which is firmly established under the Fourteenth Amendment's Due Process Clause.

3. Whether the disparity among the states requires this Honorable Court to make a definitive holding that the Fourteenth Amendment's Due Process Clause requires that only a showing that the parent's action or inaction resulting in harm to the child triggers the state's "compelling interest" without which the state may not infringe upon parents' fundamental right to parent their child.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are the original Defendant, Eric S. Harner (hereafter referred to as E.S.H. or Father), who is the biological father of the child, O.H., and the Petitioner herein. The original Plaintiff, Kent Deeter (hereafter referred to as K.D.), is a third party or legal stranger to the child and the Respondent for this proceeding. Sandra L. Cooney (hereafter referred to as S.L.C.), is O.H.'s maternal grandmother, also a third party or legal stranger, was originally identified as a co-defendant and is the second Respondent for this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

E.S.H. respectfully petitions for a writ of certiorari to review the judgment of Pennsylvania's trial and appellate courts.

OPINIONS BELOW

The memorandum of the Superior Court of Pennsylvania is unpublished and is reproduced at App. A at 1a-24a. The opinion and order of the Court of Common Pleas of Schuylkill County is unpublished and is reproduced at App. B at 25a-132a. The order of the Supreme Court of Pennsylvania is unpublished and is reproduced at App. C at 133a-134a.

JURISDICTION

The judgment of the Superior Court of Pennsylvania was entered on December 21, 2009. The order of the Supreme Court of Pennsylvania denying the Petition for Allowance of Appeal was entered on May 3, 2010. This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The first section of Amendment XIV to the Constitution of the United States provides:

> § 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

I. Factual History

This petition examines the state court's refusal to acknowledge, consider and apply the principles articulated in *Troxel v. Granville*, 530 U.S. 57 (2000) to the present case involving a parent's right to exercise custody and control of his child against a third party, a legal stranger.

Additionally, the case presents this Honorable Court with the opportunity to review whether the application of Pennsylvania's overly broad *in loco parentis* doctrine used against a fit parent, and without a finding of harm, violates the parent's due process rights.

Petitioner, E.S.H., is the father of O.H. Father and Mother were married in 1995 and O.H. was born in 1998. Mother and Father separated in 2001 and were divorced in April, 2004. Father has remained a constant presence in O.H.'s life since her birth. Pursuant to a court-approved custody agreement, Mother enjoyed primary custody while Father had physical custody of O.H. alternating week-ends of the month and every Wednesday evening for two and one-half hours. Mother and Father agreed to modify custody and for several years, in exchange for Wednesday evenings, Father enjoyed custody on three

out of four weekends per month. Father's fitness to parent his child has never been questioned.

Following their divorce, Father remarried in 2004. Mother met K.D. in 2004; she and O.H. started living with K.D. in February, 2005. Mother and K.D. were married in March, 2006. As an ex-spouse, Father was never in a position to object to Mother's remarriage to K.D. or to K.D.'s involvement in O.H.'s life by virtue of Mother's remarriage. Although Father could not object to K.D.'s involvement in his daughter's life, he never consented to K.D.'s assuming parental status and never relinquished parental authority to K.D., a legal stranger. During the marriage, K.D. exercised no legal authority over O.H. and acted in the limited role of a care-giver consistent with his marriage to Mother. He was not the child's father or parent; he was only Mother's husband.

Throughout her adult life, Mother suffered from primary sclerosing cholangitis. In the spring of 2007, Mother became sick with pneumonia, and on May 23, 2007, Mother passed away. Days after Mother's death and funeral, Father assumed sole legal and sole physical custody of O.H., and she went to live with her father, her step-mother and her half-brother. K.D. filed a custody complaint, and the trial court granted K.D. shared legal custody and shared physical custody for the summer. After two months, when the new school year started, the court granted K.D. primary custody, required O.H. to relocate back to K.D.'s home county and vitiated Father's ability and right to care for and raise his child.

Eighteen months and a full custody trial later, the trial court awarded shared legal custody and primary

physical custody to K.D., a legal stranger. E.S.H. always strenuously objected to K.D. seeking *in loco parentis* status and K.D.'s arguments that O.H. would be better cared for by him. Father E.S.H.'s legal custody was divided with K.D., and Father was granted only partial physical custody every second and fourth weekend along with shared holidays. Father appealed to the Superior Court of Pennsylvania, which affirmed the trial court's decision. After the Superior Court denied re-argument, Father submitted a Petition for Allowance of Appeal to Pennsylvania's Supreme Court, which denied review. Father now seeks this Honorable Court's review.

II. Procedural History

On May 30, 2007, K.D., claiming *in loco parentis* status, filed a complaint for custody of O.H. against E.S.H., the natural father. The proceedings and hearings conducted before trial showed that Father was always active and involved in O.H.'s life; always strongly objected to K.D. assuming a parental role in the child's life; and always maintained that no claim or interest which the court attributed to K.D. could supplant his fundamental right, as a fit father, to parent his child.

A. The Court of Common Pleas of Schuylkill County

On April 8, 2009, the Honorable Jacqueline L. Russell entered an Opinion and Final Order of the Court of Common Pleas for Schuylkill County granting shared legal custody of O.H. to K.D. and E.S.H., primary physical custody to K.D. and partial physical custody to E.S.H. The trial court's opinion repeated

K.D.'s findings of facts and conclusions of law and contained little original analysis of controlling law.

In support of its determination that K.D. and S.L.C. had standing to pursue custody, the trial court stated:

> Thus while it is presumed that a child's best interest is served by maintaining the family's privacy and autonomy, that presumption must give way where the child has established strong, psychological bonds with a person who, although not a biological parent, has lived with the child and provided care, nurture, and affection, assuming in the child's eye a stature like that of a parent. Where such a relationship is shown, our courts recognize that the child's best interest requires that the third party be granted standing so as to have the opportunity to litigate fully the issue of whether that relationship should be maintained even over a parent's objections.

Trial court opinion at App. B at 108a.

The trial court's articulated legal standard fails to account for the clear precedent of this Court, which makes clear that the parent's fundamental right cannot be impinged upon without the required compelling interest (i.e., a showing that the parent's actions harmed or will harm the child.) As Justice O'Connor opined, "The Due Process Clause does not permit a state to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made." *Troxel*, 530 U.S. at 72. Like *Troxel*, this case

involves the elevation and expansion of a broadly applied custody doctrine at the expense of a parent's fundamental right to parent his or her child. Just because the trial court believed that it could make a better decision did not entitle it to do so.

The trial court also relied on *Hiller v. Fausey*, 588 Pa. 342, 904 A.2d 875 (Pa. 2006), when it recognized that K.D. and S.L.C., "as third parties, bear a heavy burden to establish a claim to custody which is contrary to the position urged by the parent." App. B, 109a. The trial court continued to quote from that opinion:

> When the judge is hearing a dispute between the parents, or a parent, and a third party, . . . [t]he question still is, what is in the child's best interest? However, the parties do not start out even; the parents have a "prima facie right to custody," which will be forfeited only if "convincing reasons" appear that the child's best interest will be served by an award to the third party.

Trial court opinion at App. B at 110a.

The trial court refused to recognize and apply current controlling jurisprudence, which, since *Troxel*, requires more than granting fit parents a *prima facie* right to custody. Interestingly, the only place the trial court mentioned *Troxel* was in a footnote citing a dissenting opinion to support its proposition that all decisions must be child-centered:

> The Court also finds a comment by United States Supreme Court Justice Stevens in his

> dissent in *Troxel v. Granville*, 530 U.S. 57 (2000) worthy of note. Justice Stevens observed, "Cases like this do not present a bipolar struggle between the parents and the State over who has final authority to determine what is in a child's best interests. There is at a minimum a third individual, whose interests are implicated in every case. . . –the child.

Trial court opinion App. B at 108a, citing *Troxel*, 530 U.S. at 86.

The trial court failed to recognize that this case is not a parent versus parent custody case wherein the trial court must decide the child's best interests between two equally positioned parents. The trial court gave only a polite nod to Father's constitutionally protected fundamental right by applying a minimal *prima facie* presumption to his right to custody.

A parent's fundamental right to care for his or her child may only be abridged by a compelling interest that is narrowly tailored. See e.g. *Reno v. Flores*, 507 U.S. 292 (1993). The trial court granted shared legal custody and primary physical custody to a third party over the continuous objections of a fit parent by purportedly overcoming a substandard parental presumption or a mere *prima facie* right. The trial court not only ignored the parent's fundamental right but, when abridging that right, failed to identify a compelling state interest and neglected to require that such abridgment be narrowly tailored. In so doing, the trial court violated Father E.S.H.'s fundamental rights.

B. The Superior Court of Pennsylvania

The Pennsylvania Superior Court's order sustained K.D.'s *in loco parentis* status and restated the trial court's assertion that "the intent of the custody order [was] to serve [O.H.'s] well-being." (Trial court opinion, App. B, 121a). In this review, the Superior Court weighed the extent of E.S.H.'s involvement and interest in O.H.'s life against the involvement of K.D.—clearly the wrong standard.

The Superior Court merely affirmed the trial court's opinion that "there is no question that a parent has a fundamental right to make decisions about the care, custody and control of his child and that the law provides that the determination about a child made by a fit parent must be given material weight when at issue before a court." Trial court opinion, App. B at 105a. This is only lip-service to the bedrock principle articulated in *Troxel* because the Superior Court, like the trial court, failed to establish the unfitness of the parent prior to abridging his fundamental right. In upholding the trial court's decision, the Superior Court never mentioned *Troxel* or recognized its basic principle that a parent has a fundamental right to care for and raise his child.

Equally troubling is the fact that the Superior Court failed to recognize Father's reliance on *Troxel* by stating, "Father relies primarily on our Supreme Court's decision in *Shepp v. Shepp*, 88 Pa. 691, 906 A.2d 1165 (Pa. 2006), to argue that the court was required to apply a strict scrutiny test and determine if there was a compelling interest to protect the child before infringing upon this right." Superior Court opinion at App. A at 13a. The Superior Court refused

to acknowledge that Father's brief was predicated on his federally protected rights under the United States Constitution and replete with argument based upon *Troxel*, as well as subsequent state cases which clarified and incorporated its holding.

Again, seemingly without independent analysis, the Superior Court adopted the trial court's opinion and conclusions of law when it wrote, "We further decline Father's request to require the third party must prove that a parent is unfit in order to gain custody over a parent." Superior Court opinion at App. A at 12a. The Superior Court used pre-*Troxel* case law to support its misguided decision which rejected a requirement for a showing of harm and completely failed to recognize federal holdings which required harm as a condition precedent to triggering the state's compelling interest.

C. The Supreme Court of Pennsylvania

E.S.H. filed a timely appeal to the Supreme Court of Pennsylvania. By Order dated May 3, 2010, the Supreme Court denied review without comment or written opinion. App. C 133a.

REASONS FOR GRANTING THE PETITION

I. Because Pennsylvania and other states refuse to recognize a parent's fundamental right as articulated in *Troxel v. Granville* and fail to apply a strict scrutiny analysis to that fundamental right, this Court must definitively require a strict scrutiny analysis when parents' fundamental rights to govern their children's care and custody are implicated.

In *Troxel*, this Court stated, "We do not, and need not, define today the precise scope of the parental rights in the visitation context." *Troxel* at 73. Because states are unclear about the level of deference due the parent's fundamental right this Court must definitively articulate the precise scope of the parental due process right in the custody or visitation context.

Troxel clearly announced, "It cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care custody and control of their children." *Id.* at 66. What the *Troxel* Court left for another day was the business of defining precisely the appropriate standard courts must apply before depriving parents of their fundamental right to make decisions concerning the care, custody and control of their children. That day has come.

Recognizing the gravity of a fundamental right, Justice Thomas directed the court down the correct path when in his concurrence he wrote, "The opinions of the plurality, Justice Kennedy, and Justice Souter recognize such a right, but curiously none of them

articulates the appropriate standard. I would apply strict scrutiny to infringements of fundamental rights." *Id.* at 80.

II. Pennsylvania's common law *in loco parentis* doctrine has evolved into an overly broad doctrine that permits any person who believes he or she has developed a relationship with a child to seek custody of the child against the fit parent.

The *in loco parentis* doctrine developed over time as a narrow exception to the principle that only parents or the state had standing to pursue custody of a child. The doctrine requires exacting proof that the third party, the legal stranger, acted as a parent in place of the parent and with the consent of the parent.

Unfortunately, over time, through well intended, albeit misguided court decisions, the exception swallowed the rule. The once narrow legal doctrine has changed into a broadly applied legal fiction which permits any person at any time to petition the court and seek custody of a child even if the fit parent objects. This Honorable Court needs to act now to halt continued constitutional violations and rectify the immediate effects of the present wrongful decision.

III. Because there is discord among the state courts regarding whether a showing of harm is required to interfere with the parent/child relationship, this Court must intervene and require a uniform protection of this fundamental right.

Because numerous state courts refuse to recognize this Court's decisions that parents' enjoy a fundamental right to raise their children which can be impinged only by showing parental unfitness or harm to the child, this Honorable Court must address the issue and require a uniform treatment of fundamental rights.

The Pennsylvania courts in this instant matter and other states that simply provide parents with a *prima facie* right to custody of their children without any showing of harm completely undermine the principles articulated in *Troxel* and the century of precedent upon which it was built.

ARGUMENT

I. PENNSYLVANIA AND OTHER STATES OFFEND THE CONSTITUTION BY DISREGARDING CONTROLLING FEDERAL PRECEDENT AND BY FAILING TO RECOGNIZE THAT PARENTS' FUNDAMENTAL RIGHT TO PARENT THEIR CHILD REQUIRES STRICT SCRUTINY ANALYSIS.

This Court has firmly established that a parent has a fundamental right to parent his or her child and any infringement of that right must be narrowly tailored to

serve a compelling interest. The Pennsylvania trial and appellate courts refused to follow controlling United States precedent by failing to recognize that Father's right to parent his child is fundamental. The Pennsylvania courts also failed to apply the proper standard of review required to protect Father's fundamental right. Additionally, Pennsylvania is not alone; many states refuse to follow precedent and recognize fundamental parental rights. Therefore, this court must intervene.

A. Pennsylvania courts ignored *Troxel* and failed to recognize that parents enjoy a fundamental right to govern the care, custody and control of their children.

This Court has long recognized a fit parent's fundamental right to make decisions concerning his or her child's upbringing. It is "perhaps the oldest of the fundamental liberty interests." *Troxel v. Granville*, 530 U.S. at 65 (2000) (plurality opinion).

This Court has also explained that, because "[t]he child is not the mere creature of the State," *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *see also In Interest of La Rue*, 244 Pa. Super. 218, 224 (1976), "[i]t is cardinal that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (citing *Pierce*, 268 U.S. at 535). Cases such as *Myers*,[1]

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[1] *Meyer* v. *Nebraska*, 262 U.S. 390 (1923).

Pierce,[2] *Skinner*,[3] *Prince*,[4] *Yoder*,[5] and others demonstrate this Court's longstanding deference to the parents' fundamental right to rear their children without substantial and unnecessary interference from the state.

Although the plurality in *Troxel* chose not to "define today the precise scope of the parental due process right in the visitation context," Justice Thomas quite succinctly opined that "strict scrutiny should apply to infringements of fundamental rights." *Troxel* at 80. Additionally, in *Reno v. Flores*, the Supreme Court recognized that a long line of cases have interpreted the "Fifth and Fourteenth Amendments' guarantee of 'due process of law' to include a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests **at all**, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301-02, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993) (emphasis in original).

Unfortunately, even though this Court has provided adequate guidance and recognized the proper analysis for infringements of fundamental rights, the trial and appellate courts in this case refused to apply

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[2] *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

[3] *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

[4] *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

[5] *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526 (1972).

Troxel and other authority when they afforded Father a mere presumption of custody.

Clearly, *Troxel* has cemented the principle that parents have a fundamental liberty interest, grounded in the Due Process Clause of the Fourteenth Amendment, in directing the care, custody and control of their children. In the present case, the Pennsylvania courts refused to acknowledge this binding authority and failed to recognize Father's fundamental right to parent his child. In doing so, the Pennsylvania courts violated Father's clearly established right guaranteed by the Fourteenth Amendment's Due Process Clause.

B. Pennsylvania courts applied a much lower standard of review than is required to protect Father's fundamental right to parent his children.

While Justice Thomas's concurrence in *Troxel* stated that strict scrutiny review should be applied to infringements of parents' fundamental rights to parent their children (530 U.S. at 67) and while the Pennsylvania Supreme Court has held that strict scrutiny applies to infringements of fundamental rights (588 Pa at 358) the Superior Court stated that "the best interest of the child standard in custody cases gives deference to the parents' prima facie right to custody over a third party and accords such right more weight than a third party's claim." Superior Court Opinion at App. A at 14a. Simply put, considering recent United States and Pennsylvania Supreme Court decisions, the Pennsylvania Superior Court used the wrong standard.

While this Court has not yet specifically held that strict scrutiny applies to infringements on parents' fundamental right to raise their children, it has clearly applied strict scrutiny to other fundamental rights. Additionally, even though *Reno v. Flores*, 507 U.S. 292 (1993) did not use the specific phrase "strict scrutiny," the Court accepted the applicable standard as required to test the government's infringement of the fundamental right.

However, many state courts, and specifically Pennsylvania in this case, still employ a much lower "presumption of custody" standard. The Pennsylvania Superior Court relied on pre-*Troxel* case law when it stated,

> The [Superior Court] has consistently held [that] . . . "[p]arenthood alone is insufficient to defeat a custody claim raised by a non-parent." The most important issues in a custody dispute are the child's physical, intellectual, moral, and spiritual well-being. The fact that the best interest of the child is the paramount consideration is . . . beyond peradventure. . . . Indeed, even the rights of the parents are subordinate to the child's best interest.

Superior Court opinion App. A at 14a.

Pennsylvania's violation of Father's fundamental right is further evidenced by the Superior Court's statement that the "best interest standard gives deference to parents' *prima facie* right to custody over a third party and accords such right more weight than a third party's claim." Superior Court opinion App. A at 14a. The Superior Court's reliance on the "deference

to parents' *prima facie* right to custody over third parties" improperly employs a much lower standard of protection than is required by *Troxel*. *See* Superior Court Opinion, App. A at 14a. A parent cannot enjoy a fundamental right that is only afforded a *prima facie* deference. Such token protection of a fundamental right is tantamount to having no fundamental right at all.

Because the lower courts did not consider or apply the principles articulated in *Reno* and *Troxel*, this Court should reverse their decisions and reiterate that fit parents enjoy a fundamental right to the care, custody and control of their child, and all courts must apply a standard of strict scrutiny analysis to any government infringement of that fundamental right.

C. Pennsylvania is one of many states that ignore *Troxel* and other United States Supreme Court precedent which protect parents' fundamental rights against attacks by third parties.

A growing number of states, including Arizona, Arkansas, Colorado, Kentucky, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, Pennsylvania, Rhode Island, Utah, West Virginia and Wisconsin, grant custody to third parties over the objection of the child's fit parent. Relying on various theories, these states have circumvented *Troxel's* guarantee of a fit parent's right to family autonomy and privacy as displayed in the following cases: *Riepe v. Riepe*, 91 P.3d 312, 318 (Ariz. Ct. App. 2004) (A third party to a child was allowed to obtain visitation despite the fit parent's objections. The majority opinion did not apply let alone mention *Troxel* or the

mandatory presumption that the fit legal parent had acted in the child's best interest. As the dissent explained, the majority's analysis contained "serious constitutional problems."); *Robinson v. Ford-Robinson*, 2005 WL 1041158 (Ark. 2005) (An Arkansas fit biological father objected to his ex-wife, not the mother to the child, obtaining visitation. The Arkansas Supreme Court held that the *Troxel* presumption that a fit legal parent acts in the child's best interest did not apply and that the rights of the step-parent were equal to the fit biological parent under the *in loco parentis* doctrine.); *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1151 (Me. 2004) (There was no mention of *Troxel* when the court explained that once a court determines the non-parent qualifies as a *de facto* parent, the court is free to award parental rights and responsibilities over the objection of the biological parent.); *Rideout v. Riendeau*, 761 A.2d 291, 294, 297, 302 (Me. 2000) (Emotional bonds between grandparents and a child were considered to provide "a compelling basis for the state's intervention into an intact family with fit parents."); *S.F. v. M.D.*, 751 A.2d 9, 15 (Md. Ct. App. 2000) (Without any consideration of the mandates of *Troxel* to presume that the mother's decision was in the child's best interest or any "special weight" given to the mother's objection, the court granted the paramour equal status as parent.); *Gestl v. Frederick*, 754 A.2d 1087 (Md. Ct. Spec. App. 2000) (The Court found *Troxel* provides some protection to fit parents, but does not prevent third-parties from obtaining custodial rights); *T.B. v. L.R.M.*, 786 A.2d 913, 917 (Pa. 2001) (The Court found the rights of non-parents may be elevated to the same level as a fit legal parent.); *Jones v. Jones*, 884 A.2d 915 (Pa. Super. Ct. 2005) (Without mentioning *Troxel*, the Court found a non-parent may obtain custody by proving with clear and

convincing evidence that the change is in the best interest of the child.); and *Rubano v. DiCenzo*, 759 A.2d 959, 976 (R.I. 2000) (The existence of a relationship between the child and the third party was found to justify the state's infringement on the parent's due process rights.)

Too many states disregard the fit parents' constitutional right to parent his child in favor of accommodating third parties. Some suggest that a *de facto* parent automatically stands equal to a biological parent while others explain that a non-parent's emotional attachment to a child provides the compelling interest necessary to overcome the biological parents' right to family autonomy and privacy guaranteed by the Constitution. Whatever the reason, these states violate parents' fundamental right to direct their child's care, and this court must act now to prevent further deprivations.

II. PENNSYLVANIA'S *IN LOCO PARENTIS* DOCTRINE VIOLATED FATHER'S FUNDAMENTAL RIGHT TO PARENT HIS CHILD

Pennsylvania's progressive expansion of the common law *in loco parentis* doctrine violates parents' constitutional rights. In *Troxel*, the United States Supreme Court upheld the striking of Washington's overly broad grandparent visitation statute that permitted a trial court to grant visitation to any person at any time based solely on the trial court's perception of the child's best interest. This Court found the statute constitutionally offensive because it violated the parent's fundamental right guaranteed by the Fourteenth Amendment to direct the care, custody

and control of his child. Presently, Pennsylvania's *in loco parentis* doctrine suffers from the same constitutional infirmity. Without respect for the parent's fundamental right it permits a trial court to grant custody to any person claiming a relationship with the child. This can happen even if the third party has no biological ties to the child and even if the fit parent strongly objects to the third party's interference with the parent/child relationship. Frequently, as in the present case, the trial court exercises unfettered discretion and grants any third party, relative to the child or not, custody of the child by substituting its perception of the child's best interest for the parent's determination of the child's best interest.

Pennsylvania's *in loco parentis* doctrine used to protect parents' constitutional rights. Such is no longer the case. The new, expanded *in loco parentis* doctrine disregards set constitutional protections. An analysis of the pertinent cases shows that historically, to seek custody of a child, a third party needed either statutory standing or stood *in loco parentis* by assuming parental status and responsibilities with the consent of the parent. *See Kramer v. McMahon*, 640 A.2d 926 (Pa. Super. Ct. 1994) (The core concept was that persons other than biological parents are third parties for purposes of custody disputes.); *Morgan v. Wiser*, 923 A.2d 1183, 1187 (Pa. Super. Ct. 2007) (In order to protect the family and the parent/child relationship, this doctrine firmly established that "a third party cannot place himself *in loco parentis* in defiance of the parents' wishes and the parent/child relationship."); and *B.A. & A.A. v. E.E.*, 559 Pa. 545, 550-551, 741 A.2d 1227, 1230, (1999) (citing *Gradwell v. Strausser*, 610 A.2d 999, 1003 (Pa. Super. Ct. 1992)) (Third parties could only assume parental status and

responsibilities "as a result of the participation and acquiescence of the parents." *J.F. v. D.B.*, 897 A.2d 1261, 1227 (Pa. Super. Ct. 2006)).

Father and Mother decided to start a family and have a baby together. K.D. never figured into that equation; he was, and remains, a third party to the parent/child relationship. Father never authorized K.D. to play an active role as a parent to O.H. Father never consented or acquiesced to K.D. performing parental duties, he never encouraged K.D. to act in a parental role, he did not introduce K.D. into the child's life and he never permitted K.D. to direct the child's upbringing. K.D. clearly assumed parental status against the wishes of the remaining parent.

K.D. never acted in a fashion other than, perhaps, a frequent caregiver. By his own admission, K.D. was never given permission to assume parental status or discharge parental duties (R. 00841-43). While Mother was alive, she, not K.D., exercised parental authority over O.H. (R. 00845-46). Mother was primarily responsible for the child's medical care. Further, Father remained a constant presence in O.H.'s life. Mother and Father, not K.D., oversaw the child's educational progress (R. 00846, 01401). While it may be true that K.D. did some activities with O.H. such as reading or occasionally helping with homework (R. 00845), that level of involvement does not equate to assuming parental status.

After Mother died, the trial court's Interim Order thrust K.D. into the parental role (R. 00449-57). Father demonstrated his strong objection by filing an Emergency Petition for Special Relief (R. 00458-65). The record clearly establishes that K.D. placed himself

in loco parentis in direct defiance of E.S.H.'s wishes and to the detriment of the parent/child relationship (R. 00846, 00118-20, 00841-43).

Because the traditional protections afforded parents' constitutional rights are no longer applied, the Pennsylvania courts violated Father's constitutional rights by creating a new and overly broad *in loco parentis* doctrine that allows any person at any time to take the parent's place without providing the necessary constitutional safeguards.

Without Pennsylvania's radical departure from the controlling principle that parents enjoy a fundamental right to parent their children, K.D. would not even have been allowed to adopt O.H. because the fit parent never relinquished his fundamental right to care for his child. In essence, Pennsylvania's refusal to recognize father's fundamental rights gave K.D. squatter's rights to another man's child. This cannot stand.

Had the constitutional protections contained in this intentionally narrow legal doctrine been properly applied, the lower courts would have determined that K.D. could not and did not establish *in loco parentis* standing prior to the custody action. However, because the courts expanded this narrow legal doctrine and rejected federal guidance regarding parents' fundamental rights, the immediate result was a decision that violates a fit parent's fundamental right to parent his child.

Such expansion invites bizarre consequences. If a parent's paramour can so easily attain *in loco parentis* status over the second parent's objections, no parent's

fundamental right is secure. Because many parents often cohabitate with multiple people throughout their lives, it is foreseeable that every paramour with whom a parent lives or introduces into the child's life, even over the other parent's objections, would establish *in loco parentis* status and stand equal with the parents for custody purposes. The argument that a court could determine whether such an expanded number of "parents" is in the child's best interest conveniently ignores the primary issue - the "child is not the mere creature of the State," *Pierce*, 268 U.S. 510, 535 (1925), but has been entrusted to the parent who provided for and raised the child in ways the state cannot and should not.

Permitting third parties with whom the child may have a relationship to seek custody of the child undermines and dilutes the parent's rights. The trial court's expansion of the *in loco parentis* doctrine is a violation of the fit parent's fundamental right to parent his child just as the overly broad Washington State statute violated Granville's fundamental rights. Therefore, Father respectfully requests that this Court grant review, and upon review, reverse the decisions of the lower courts and restore the strict parameters of the *in loco parentis* doctrine.

III. UNIFORM APPLICATION OF THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE REQUIRES THAT BEFORE THE STATE'S COMPELLING INTEREST IS TRIGGERED, THE STATE MUST ESTABLISH THAT THE PARENT HARMED THE CHILD

Through the years, this Court has clearly articulated that parents enjoy a fundamental right to the care, custody and control of their children and a showing of harm to the child is needed to trigger the state's compelling interest before curtailing that fundamental right. Whether in the grandparent visitation context or a non-grandparent third party custody case, confusion abounds because parents' established fundamental right presumably requires strict scrutiny protection as do other fundamental rights but *Troxel* provides no guidance. *Troxel* passed on providing a standard for protecting this right.

Because the decision from Pennsylvania's appellate court is out of step with controlling federal authority and because confusion and disparity exists among the various states, uniform application of the Fourteenth Amendment's Due Process Clause requires this Court to declare that before the state's compelling interest is triggered, the parent's actions or inaction must be shown to result in harm to the child.

A. Pennsylvania courts are out of step with constitutional law which requires a determination that the parent harmed the child before triggering the state's compelling interest.

More than eighty-five years ago, in *Meyer v. Nebraska*, 262 U.S. 390 (1923) this Court ruled that the Due Process Clause protects parents' fundamental right to raise their children and control their children's education. *Id.* at 399. This principle has been affirmed in numerous contexts. The state can interfere with this fundamental right only "if it appears that the parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972).

Since *Yoder*, this Court has continued to hold that without showing harm, third parties are not entitled to custody over parents. For instance, this Court has held that a child cannot be removed from a parent's home to be adopted by another as long as the parents are adequately providing for the child. "We have little doubt that the Due Process Clause would be offended 'if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.'" *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978). Federal law does not authorize "unrelated persons to retain custody of a child whose parents have not been found to be unfit," *Deboer v. Deboer*, 509 U.S. 1301, 1302 (1993). Additionally, "'the best interests of the child' is not the legal standard that governs parents' or guardians' exercise of their custody: so long as certain minimum requirements of

child care are met, the interests of the child may be subordinated to the interests of other children, or indeed even to the interests of the parents or guardians themselves." *Reno v. Flores*, 507 U.S. 292, 304 (1993) citing *R.C.N.* v. *State*, 141 Ga. App. 490, 491, 233 S.E.2d 866, 867 (1977).

Despite the wealth of federal guidance, the Pennsylvania courts fail to consistently follow the law and require a showing of harm before interfering with a parent's fundamental right. In the instant matter neither the trial nor the appellate court applied the constitutional requirements to Father's fundamental right to direct his child's upbringing. In its ruling, the Pennsylvania appellate court stated:

> We further decline Father's request to require that a third party must prove that a parent is unfit in order to gain custody over a parent. As set forth above, the *in loco parentis* basis for standing holds no such requirement. Moreover, our Supreme Court has consistently rejected this argument with respect to custody determination.

Superior Court opinion, App. A at 12a.

Because this Court has seen fit to protect parents' fundamental rights to parent the child by requiring a demonstration of harm, the Pennsylvania courts are out of step with required constitutional protections.

The progression of applicable case law establishes that while the state has a compelling interest in protecting the well-being of a child, that compelling interest is not triggered unless there is some

demonstrable harm that will befall the child if the court does not interfere with the parent's fundamental right, and then, courts may interfere only in the least restive way.

Troxel and the cases upon which its authority was based unquestionably established a parent's fundamental right. Because the Pennsylvania courts failed to follow federal precedent, the decision cannot stand.

B. Because discord exists among the states regarding whether a showing of harm is required to interfere with the parent/child relationship, this Court must require a uniform treatment of fundamental rights.

As noted above, several federal cases require that in disputes between a parent and a third party, before interfering with the parent/child relationship, harm to the child must be shown. However, various state courts routinely disregard this principle and employ a simple "best interest" analysis, treating parents and non-parents alike.

Uniformity and equal treatment require that this Court intervene. The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer v. Nebraska*, 262 U.S. at 399 (1923), the Equal Protection Clause of the Fourteenth Amendment, *Skinner v. Oklahoma*, 316 U.S. at 541 (1942), and the Ninth Amendment, *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring), *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). The "Due Process Clause of the Fifth Amendment guarantees every person the equal

protection of the law 'which is essentially a direction that all persons similarly situated should be treated alike.'" *Jankowski-Burczyk v. INS*, 291 F.3d 172, 176 (2d Cir. Conn. 2002), citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (1982)). Given the substantial protections afforded parents' fundamental rights, equal protection demands uniform application of law regarding the triggering of the state's compelling interest. The level of protection given a fit parent's fundamental right to control or care for his child cannot depend upon the whim of a trial court that refuses to follow federal precedent.

Many states do not require parental harm to the child before interfering with the parent/child relationship. See for instance: *Vibbert v. Vibbert*, 144 S.W.3d 292 (Ky. App. Ct. 2004) (The Appeals Court of Kentucky discarded their standard for showing harm in non-parental visitation context calling the standard "unnecessarily strict and unworkable."); *Downs v. Scheffler*, 206 Ariz. 496, 502 (Ariz. 2004) ("It is inappropriate to defer an examination of the child's best interests until parental inappropriateness is established."); *Harrold v. Collier*, 107 Ohio St. 3d 44, 2005 Ohio 5334, 836 N.E.2d 1165 (2005) (Ohio considers the child's best interests as the paramount concern and for its determination will consider fifteen factors, only one of which is whether the parent ever abused the child or caused harm to another family member who is a party to the proceedings. Ohio believes this approach does not minimize the "special weight" due to the wishes of a parent.) See also *State ex rel. Reeves v. O'Malley*, 2001 Ohio App. LEXIS 2530 (Ohio Ct. App., Cuyahoga County June 1, 2001) (citing

Boyer v. Boyer, 46 Ohio St. 2d 83 (OH 1976) (Ohio held in "determining who shall have the care, custody and control of a child under eighteen years of age, even though the child's parents are not found to be unfit or unsuitable, the court may commit the child to a relative when the court finds that custody to neither parent is in the best interest of the child."); *Brandon L. v. Moats*, 209 W. Va 752, 551 S.E.2d 674 (W. Va. 2001) (West Virginia does not require a showing of unfitness before interfering with the parent/child relationship, finding that due process concerns were satisfied by statutory requirements that the court consider the child's best interests and minimize interference in the parent/child relationship.); *Zeman v. Stanford*, 789 So. 2d 798, 804 (Miss. 2001) (There is no requirement of finding parental harm to the child before grandparents may obtain visitation, but factors in the court's best interest approach include harm to the child if visitation with grandparents is denied.); and *Roger D.H. v. Virginia O.* (*In re Roger D.H.*), 2002 WI App. 35, 12 (Wis. Ct. App. 2002) (Wisconsin law (Stat. § 767.245) "does not require a showing of parental unfitness before a court may override a parent's decision regarding grandparent visitation, nor do we find any case law from this state holding as much. There is no suggestion in *Troxel* that a court may only interfere with a parent's decision regarding visitation if the parent is shown to be unfit.")

In contrast, many other states' highest courts have followed federal precedent and declined to award custody to third party over the parent absent a showing of parental unfitness or harm to the child. This is because many states still respect controlling authority and the principle that the best interests of the child is found within the custody and care of the

parent.[6] See e.g.: *Askew v. Donoho*, 993 S.W.2d 1 (Tenn. 1999) (The "magnitude of a parent's constitutional right to rear and have custody of his or her children would necessitate a clear finding of substantial harm."); *Hawk v. Hawk*, 855 S.W.2d 573, 580 (Tenn. 1993) (The Court required "an initial showing of harm . . . before the state may intervene to determine the 'best interests of the child.'"); *Brooks v. Parkerson*, 265 Ga. 189, 454 S.E.2d 769, at 774 (Ga. 1995) ("[T]he 'best interest of the child' standard does not come into play to permit interference with the custody and control of the child, over parental objection, unless and until there is a showing of harm to the child."), *cert. denied*, 516 U.S. 942, 116 S. Ct. 377, 133 L. Ed. 2d 301 (1995); *In re Herbst*, 1998 OK 100, 971 P.2d 395, 399 (Okla. 1998) ("To reach the issue of a child's best interests, there must be a requisite showing of harm, or threat of harm. . . . Absent a showing of harm (or threat thereof), it is not for the state to choose which associations a family must maintain and which the family is permitted to abandon."); and *Williams v. Williams*, 256 Va. 19, 501 S.E.2d 417, 418 (Va. 1998) ("For the constitutional requirement to be satisfied, before visitation can be ordered over the objection of the child's parents, a court must find an actual harm to the child's health or welfare without such visitation. A court reaches consideration of the 'best interests' standard in determining visitation only after it finds harm if visitation is not ordered.").

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[6] See Appendix D for a list of states, with citations and pertinent language.

Several states have observed and noted that *Troxel's* refusal to require a showing of harm causes confusion. "Moreover, after *Troxel* it appears that federal constitutional law in this area is now not as predictable as it was before *Troxel*." *DeRose v. DeRose*, 469 Mich. 320, 334 (Mich. 2003), or, as stated by New Jersey:

> Courts across the country have wrestled with the issue of grandparent visitation both before and after *Troxel*. In general, they have engaged in one of two modes of analysis: (1) interpreting the statutes to require satisfaction of a harm standard in order to overcome the presumption in favor of a fit parent's decision or (2) avoiding the articulation of any standard at all and analyzing the statutes on a case-by-case basis. *Troxel* implied that either approach would be acceptable.

Moriarty v. Bradt, 177 N.J. 84, at 109 (N.J. 2003)

Because there is disagreement among the states regarding when and under what circumstances a state or court may interfere with the parent's fundamental right to parent a child, this Court must definitively articulate, in keeping with its earlier decisions, that the state's compelling interest in protecting the welfare of the child is not triggered unless there is some showing that the parent harmed or will harm the child. This standard alone, equally applicable in all states at all times, will preserve the longstanding fundamental liberty interest that this Court has so consistently protected.

CONCLUSION

This Honorable Court should grant Father's Petition for Writ of Certiorari because the evidence is clear that Pennsylvania and other states do not implement adequate protections for a parent's fundamental right to parent his or her child. Pennsylvania's overly broad *in loco parentis* doctrine deprives parents of their rightful ability to care for and control their children. Further, there is disparity among the states regarding the requirement for a showing of harm as a condition precedent for triggering the state's compelling interest. For these reasons, this Honorable Court must summarily reverse the decision of the Pennsylvania courts and must unambiguously hold that strict scrutiny must be applied to deprivations of parents' fundamental rights and that harm to the child is a condition precedent to triggering the state's compelling interest before interfering with the parent/child relationship. Only in this way will parents' fundamental right to raise and care for their children be protected.

Respectfully submitted,

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APPENDIX

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APPENDIX A

J. A29039/09

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 768 MDA 2009

[Filed December 21, 2009]

K.D.,	)
	)
Appellee	)
	)
v.	)
	)
E.S.H. & S.L.C.	)
APPEAL OF: E.S.H.,	)
	)
Appellant	)
	)

Appeal from the Order of April 8, 2009,
in the Court of Common Pleas of Schuylkill County,
Civil Division at No. S-1298-2007

BEFORE: FORD ELLIOTT, P.J., FREEDBERG and COLVILLE*, JJ.

MEMORANDUM: FILED: December 21, 2009

E.S.H. ("Father") appeals from the order of the Court of Common Pleas of Schuylkill County granting primary physical custody of his minor daughter, O.H., to K.D. ("stepfather"). The order granted Father partial physical custody. Father and Stepfather share legal custody. We affirm.[1]

The pertinent facts and procedural history are as follows. O.H., a female, was born on January 21, 1998, to Father and K.C.D. ("Mother"), who were husband and wife.[1] Father and Mother separated in April of 2001; they were divorced three years later. Custody stipulations were approved by orders dated June 28, 2001, and November 14, 2003, providing that Mother exercise primary physical custody of O.H., and Father partial physical custody on the first, second, and fourth weekends per month, and one evening per week for two and one-half hours. Father and Mother held joint legal custody.

In February of 2005, Mother and O.H. moved into the home of Stepfather in Hegins, Schuylkill County,

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* Retired Senior Judge assigned to the Superior Court.

[1] As part of this order, S.L.C., O.H.'s maternal grandmother, was awarded partial physical custody of O.H. Father does not raise any issues on appeal with respect to the award of partial custody to the maternal grandmother.

[2] At the time of the court's custody order, O.H. was 11 years old.

Pennsylvania. Mother and Stepfather married in March of 2006. As a result of the move, O.H. transferred during first grade to the Tri-Valley School District. Following Mother's move, Father continued to exercise partial physical custody on alternating weekends.

Father lives in Duncannon, Perry County, Pennsylvania, which is approximately one hour from Stepfather's home. Father remarried in 2004, and he and his wife, J.H. ("Stepmother"), have a son, born in January of 2005. At the time of the custody trial, Father and Stepmother were expecting another child to be born in August of 2009.

Mother was diagnosed with primary sclerosing cholangitis, a disease involving her liver, shortly after O.H.'s birth. She died from complications related to the disease on May 23, 2007. Thereafter, on May 30, 2007, the instant custody action was commenced by Stepfather, wherein he sought shared legal and primary physical custody of O.H. Father filed a timely answer to the custody complaint and preliminary objections, asserting that Stepfather did not have standing to pursue custody, and, further, O.H.'s best interests would not be served by awarding shared legal and primary physical custody to Stepfather. On June 20, 2007, a hearing was held with regard to Father's preliminary objections. Following the hearing, the trial court issued an interim order overruling Father's preliminary objection contending Stepfather did not have standing, but indicating that it would consider additional evidence as to standing at a final custody trial and providing that the parties share legal and physical custody on a week on/week off basis. The order was modified on August 31, 2007, granting

Stepfather physical custody during the school week following the trial court's finding that O.H. should continue attending school in the Tri-Valley School District pending a final custody order. Father was granted physical custody every weekend. The parties continued to share legal custody.

In October of 2007, Father, Stepmother, Stepfather, maternal grandmother, and O.H, participated in a custody evaluation with Peter H. Thomas, Ph.D., the court-appointed expert clinical psychologist. A custody trial was held on November 12, 2008, November 13, 2008, November 14, 2008, November 21, 2008, January 21, 2009, and January 22, 2009. The trial court received testimony from seventeen witnesses, including Father; Stepmother; Stepfather; maternal grandmother; O.H.; J.H., Mother's close friend; J.B., Stepmother's mother; Dr. Thomas; L.B., friend of Father; S.H., friend of Father and Stepmother; R.W., friend of Father and Stepmother; Kurtz Raymond Cockley, grief counselor; A.D., mother of O.H.'s best friend; P.D., O.H.'s best friend; J.D., Stepfather's mother; Carol Stehr, O.H.'s fourth grade teacher; and Debra Barry, O.H.'s fifth grade teacher.

On April 8, 2009, the trial court entered a custody order granting shared legal custody on an interim basis to Father and Stepfather, primary physical custody to Stepfather, and partial physical custody to Father on alternating weekends. The order permitted Father to exercise custody for several hours on weekends when O.H. is with Stepfather and three hours, twice per week, on weekdays. The order also granted partial physical custody to maternal grandmother. In addition, the order provided a custody schedule for holidays. An opinion, ninety-two pages in

length, accompanied the order, wherein the trial court concluded Stepfather had standing based on *in loco parentis* status and set forth the testimonial evidence and the relevant law to support its custody award. This timely appeal followed.

On appeal, Father raises four issues for our review:

> I. Whether the trial court properly conferred *in loco parentis* standing upon a third party, permitting him to litigate a custody action against the fit natural father who has always been active and involved in the child's life and who never consented to the third party assuming or exercising parental responsibilities?
>
> II. Whether the [trial] [c]ourt deprived [Father] of his constitutional right to parent and direct the upbringing of his child?
>
> III. Whether [Father's] [p]rocedural [d]ue [p]rocess rights under the Fourteenth Amendment were violated when the [trial] [c]ourt issued its interim [o]rder requiring the child to remain in the custody of [Stepfather], a third party, pending the outcome of the custody trial[?]
>
> . . .
>
> [IV.] Whether [Stepfather] satisfied the heavy burden of tipping the scale in his favor by proving by clear and convincing evidence that it is **against** the child's best interest for the fit natural parent [to] have primary custody when the evidence regarding the intellectual,

> physical, spiritual and moral factors was either weighted in [Father's] favor, or equally balanced with the third party?

Father's brief at 8 (emphasis in original).[3]

> Our standard and scope of review is as follows:
>
> It is well-established in Pennsylvania that custody and visitation matters are to be decided on the basis of the judicially determined 'best interests of the child' standard, on a case-by-case basis, considering all factors which legitimately have an effect upon the child's physical, intellectual, moral, and spiritual well-being.
>
> On appeal, our scope of review is broad in that we are not bound by deductions and inferences drawn by the trial court from the facts found, nor are we required to accept findings which are wholly without support in the record. On the other hand, our broad scope of review does not authorize us to nullify the fact[-]finding function of the trial court in order to substantiate our judgment for that of the trial court. Rather, we are bound by findings supported in the record, and may reject conclusions drawn by the trial court only if they involve an error of law, or are unreasonable in light of the sustainable findings of the trial court.

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[3] Father's statement of questions involved includes five issues. However, Father's third and fourth issues are the same. Therefore, we have omitted Father's duplicate issue.

Hicks v. Hicks, 868 A.2d 1245, 1247-48 (Pa. Super. 2005) (internal citations and emphasis omitted). "Further, on the issues of credibility and weight of the evidence, we defer to the findings [of] the trial judge. Additionally, appellate interference is allowed only where it is found that the custody order is manifestly unreasonable as shown by the evidence of record." ***Saintz v. Rinker***, 902 A.2d 509, 512 (Pa. Super. 2006) (citation omitted).

In his first issue on appeal, Father argues that the trial court erred in granting Stepfather standing to seek custody of O.H. as he failed to establish *in loco parentis* status with respect to O.H. Specifically, Father argues Stepfather did not assume parental status and discharge parental duties with respect to O.H. Father argues that during Mother's life, Mother was the primary caregiver in her household while Stepfather's role was that of a frequent caregiver and that Father never consented to Stepfather acting *in loco parentis* to O.H. Father argues that while Stepfather may have assumed parental status and discharged parental duties with respect to O.H. after Mother's death, he did so in defiance of Father's wishes. Father further argues the trial court erred in failing to determine standing prior to proceeding to a best interest analysis. Finally, Father argues that this Court should require a third party to prove that the natural parent is unfit in order to gain custody over the natural parent. We disagree.

It is well-established that "[t]he phrase '*in loco parentis*' refers to a person who puts oneself in the situation of a lawful parent by assuming the obligations incident to the parental relationship without going through the formality of a legal

adoption." *T.B. v. L.R.M.*, 786 A.2d 913, 916 (Pa. 2001).

> The status of *in loco parentis* embodies two ideas; first, the assumption of a parental status, and, second, the discharge of parental duties. The rights and liabilities arising out of an *in loco parentis* relationship are, as the words imply, exactly the same as between parent and child. The third party in this type of relationship, however, can not place himself *in loco parentis* in defiance of the parents' wishes and the parent/child relationship.

Id. at 916-17 (citations omitted).

Specifically, with respect to the status of *in loco parentis* as related to stepparents, this Court has explained:

> The *in loco parentis* basis for standing recognizes that the need to guard the family from intrusions by third parties and to protect the rights of the natural parent must be tempered by the paramount need to protect the child's best interest. Thus, while it is presumed that a child's best interest is served by maintaining the family's privacy and autonomy, that presumption must give way where the child has established strong psychological bonds with a person who, although not a biological parent, has lived with the child and provided care, nurture, and affection, assuming in the child's eye a stature like that of a parent. Where such a relationship is shown, our courts recognize that the child's best interest requires

that the third party be granted standing so as to have the opportunity to litigate fully the issue of whether that relationship should be maintained even over a natural parent's objections.

Although the requirement of *in loco parentis* status for third parties seeking child custody rights is often stated as though it were a rigid rule, it is important to view the standard in light of the purpose of standing principles generally: to ensure that actions are brought only by those with a genuine, substantial interest. When so viewed, it is apparent that the showing necessary to establish *in loco parentis* status must in fact be flexible and dependent upon the particular facts of the case. Thus, while unrelated third parties are only rarely found to stand *in loco parentis*, step-parents, who by living in a family setting with the child of a spouse have developed a parent-like relationship with the child, have often been assumed without discussion to have standing to seek a continued relationship with the child upon the termination of the relationship between the step-parents. ***See, e.g., Commonwealth ex rel. Patricia L.F. v. Malbert J.F., supra*** (considering, but denying on the merits, step-parent's claim for custody); ***Auman v. Eash***, 228 Pa. Super. 242, 323 A.2d 94 (19[74]) (same). Where the issue of a step-parent's standing has been directly addressed by this court, standing has been found to exist because the step-parents stood *in loco parentis* to the child or children in question. ***Karner v. McMahon, supra; Spells v. Spells***, 250 Pa. Super. 168, 378 A.2d 879 (1977).

J.A.L. v. E.P.H., 682 A.2d 1314, 1319-1320 (Pa. Super. 1996).

Once it is determined that a third party has standing, the trial court is bound to apply the following principles in making its custody determination:

> When the judge is hearing a dispute between the parents, or a parent, and a third party, . . . [t]he question still is, what is in the child's best interest? However, the parties do not start out even; the parents have a '*prima facie* right to custody,' which will be forfeited only if 'convincing reasons' appear that the child's best interest will be served by an award to the third party. Thus, even before the proceedings start, the evidentiary scale is tipped, and tipped hard, to the parents' side. What the judge must do, therefore, is first, hear all evidence relevant to the child's best interest, and then, decide whether the evidence on behalf of the third party is weighty enough to bring the scale up to even, and down on the third party's side.

Ellerbe v. Hooks, 416 A.2d 512, 513-514 (Pa. 1980) (citation omitted). The ***Ellerbe*** Court explained, "[c]learly these principles do not preclude an award of custody to the nonparent. Rather they simply instruct the hearing judge that the non-parent bears the burden of production and the burden of persuasion and that the non-parent's burden is heavy." ***Id.*** at 514.[4]

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[4] Our Supreme Court in ***Rowles v. Rowles***, 668 A.2d 126 (Pa. 1995), attempted to abolish the parental presumption in custody decisions. However, because this attempt was part of a plurality

Instantly, the trial court found that Stepfather had standing based on *in loco parentis* status with respect to O.H. which pre-dated the instant custody action. It explained:

> [Father] has claimed that he did not consent to [Stepfather's] provision of care to and exercise of parental duties over [O.H.]. However, [Father] was very aware of [Mother's] condition, as she had become sick shortly after [O.H.] had been born.[5]
>
> [Father] knew that [Stepfather] was providing care for [O.H.] during [Mother's] life, and, he knew that [Stepfather] was supporting [O.H.] financially, especially as [Father] had been incarcerated on one occasion for non-support. . . .
>
> While [Mother] and [O.H.] lived with [Stepfather], and following [Mother's] death, [Stepfather] consistently attended to [O.H.'s] school affairs, and met with her teachers. In addition to providing for her financially, [Stepfather] has covered [O.H.] with health insurance and has seen that she obtained medical, dental and eye care. It is evident that [Father] did not actively engage in [O.H.'s] academic progress and affairs. . . .

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decision, it is not binding precedent. ***See Charles v. Stehlik***, 744 A.2d 1255, 1258 (Pa. 2000) (applying the ***Ellerbe*** rule to custody determination between biological parent and third party).

[5] The record reveals that Mother's disease would at times render her incapable of performing her parental duties to O.H.

> Although [Father's] claim that he did not expressly consent to [Stepfather's] provision of care and exercise of parental duties appears to be the case, he certainly did not protest, but, rather, tacitly consented to [Stepfather's] perform[ance] [of] parental duties prior to [Mother's] death. In particular, [Father] clearly offered no contest when [Stepfather] provided for [O.H.] financially, or handled her academic and medical issues, or her extra-curricular activities.

Trial Court Opinion, 04/08/09, at 74-75. In addition, O.H. testified that Stepfather is "kind of like a dad," and she acknowledged that she feels for him like a dad. N.T., 01/22/09, at 696-97.

The record supports the trial court's findings. Further, the court's conclusion that Stepfather had standing to pursue custody based upon his *in loco parentis* status is reasonable. Moreover, the record belies Father's claim that the trial court failed to determine Stepfather's standing prior to proceeding to a best interest analysis. Thus, we find no error by the trial court in this regard.

We further decline Father's request to require that a third party must prove that a natural parent is unfit in order to gain custody over a natural parent. As set forth above, the *in loco parentis* basis for standing holds no such requirement. Moreover, our Supreme Court has consistently rejected this argument with respect to custody determinations. In ***Charles***, our Supreme Court stated as follows:

> '[T]he cardinal concern in all custody cases is the best interest and permanent welfare of the child.' In staying true to the maxim, we have decreed that there will be instances where it is proper to award custody to the third party even where there has been no showing that the biological parent is unfit. While this Commonwealth places great importance on biological ties, it does not do so to the extent that the biological parent's right to custody will trump the best interests of the child. In all custody matters, our primary concern is, and must continue to be, the well-being of the most fragile human participant – that of the minor child.

Charles, 744 A.2d at 1259 (citation omitted); ***see also Albright v. Commonwealth***, 421 A.2d 157 (Pa. 1980). For all of the above reasons, Father's first claim fails.

In his second issue, Father argues the custody order violates his fundamental constitutional right to parent his child. Father relies primarily on our Supreme Court's decision in ***Shepp v. Shepp***, 906 A.2d 1165 (Pa. 2006), to argue that the court was required to apply a strict scrutiny test and determine if there was a compelling interest to protect the child before infringing upon this right. Thus, Father argues the trial court erred in its analysis and application of the controlling law. We disagree. ***Shepp*** is inapposite to this matter as it was limited to consideration of "the extent to which courts can limit parents from advocating religious beliefs that, if acted upon, would constitute criminal conduct." ***Id.*** at 1166.

Further, as discussed above, the best interest of the child standard in custody cases gives deference to the natural parents' prima facie right to custody over a third party and accords such right more weight than a third party's claim. ***See Charles***, 744 A.2d. at 1259; ***see also J.A.L.***, 682 A.2d at 1319 (stating "the increased burden of proof required of third parties seeking custody rights provides an additional layer of protection for the parent."). However, as this Court has consistently held:

> . . . [P]arenthood alone is insufficient to defeat a custody claim raised by a non-parent. The most important issues in a custody dispute are the child's physical, intellectual, moral, and spiritual well-being.
>
> The fact that the best interests of the child is the paramount consideration is . . . beyond peradventure. . . . **Indeed, even the rights of natural parents are subordinate to the child's best interest.**

Cardamone v. Elshoff, 659 A.2d 575, 580 (Pa. Super. 1995) (citations omitted) (emphasis in original). The trial court's application of the best interest standard here in determining Father's custodial rights with respect to O.H. was not in error. As such, Father's second claim fails.

In his third issue, Father claims the trial court's interim orders granting Stepfather custody violated his procedural due process rights under the Fourteenth Amendment. In the argument section of his brief, Father baldly asserts that the interim orders interfered with the parent/child relationship and

disregarded his *prima facie* right to custody. ***See*** Father's brief at 19. Father does not cite to any authority in support of his position and he fails to develop his argument in any meaningful way. Therefore, Father's claim is waived.[6] ***See Lackner v. Glosser***, 892 A.2d 21, 29-30 (Pa. Super. 2006) (stating "arguments which are not appropriately developed are waived. Arguments not appropriately developed include those where the party had failed to cite any authority in support of a contention.") (internal citations omitted).

In his final issue, Father argues, assuming *arguendo* Stepfather has standing, Stepfather did not meet his burden of proof with respect to the best interest standard. Father argues the evidence weighed in favor of granting him primary custody where he adequately tends to O.H.'s physical, emotional, educational and spiritual needs. Father argues the trial court improperly weighed evidence of his anger and there was no evidence that it would be harmful for O.H. to be placed in Father's primary custody. Our review of the record reveals no error by the trial court in the weight accorded the evidence in this case.

In Dr. Thomas' report of the custody evaluation, he concluded that a positive bond exists between Father and O.H. and between Stepfather and O.H. However, Dr. Thomas noted that the personality test

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[6] Further, in violation of Pa.R.A.P.2119, Father did not designate the issue in the argument section of his brief. ***See*** Pa.R.A.P. 2119(a)("[t]he argument shall be divided into as many parts as there are questions to be argued; and shall have at the head of each part – in distinctive type . . . the particular point treated therein. . .").

administered to Father revealed he did not respond to the questions in an open and forthright manner. He concluded that Father had a concerning behavior pattern involving a history of conflicts with people. Dr. Thomas opined Father would not promote O.H.'s relationship with maternal grandmother, to whom she is also bonded, but that he would comply with a custody order in this regard. On the other hand, the results of the personality test administered to Stepfather revealed a normal mental status and that he was fairly straightforward in the evaluation. Dr. Thomas recommended that Stepfather be granted primary physical custody during the school year and Father partial physical custody on alternate weekends. During the summer months, he recommended that Father have primary physical custody and Stepfather have partial physical custody on alternate weekends. Finally, Dr. Thomas recommended that Father and Stepfather hold joint legal custody.

The trial court explained its decision as follows:

> The [c]ourt has considered Dr. Thomas' evaluation and expressed opinions and the fact that he had been somewhat constrained in fully examining the situation, due to his not having had the benefit of all the evidence which the [c]ourt heard, and, the fact that [Father] had not been forthright during the custody evaluation process. As observed by [Dr.] Thomas, [O.H.] is a young girl whose memories of her family's household likely consist of the time she spent with [Stepfather] and [Mother], rather than that in the household which had consisted of [Mother] and [Father]. [O.H.] cherished her mother and her memories of

[Mother] are of great importance to her. [O.H.] also loves her grandmother, . . . who has always been deeply involved in [O.H.'s] life.[7] [O.H.] also loves [Stepfather's] family members, all of whom she considers as her family.

[O.H.] lost her mother and, when sad, seeks comfort from those who were close to her mother, including [Stepfather], [Stepfather's] daughter, [maternal grandmother], [J.H., Mother's best friend], and from her best friend's mother, [A.D.]. An antagonistic relationship existed between [Mother] and [Father] prior to [Mother's] death which likely was apparent to [O.H.]. Notably, [O.H.] indicated that she would not seek solace from her father when sad. [O.H.] finds comfort in visiting and caring for her mother's grave on a regular basis. . . . [O.H.] desires to attend her mother's church, about which she has happy memories. . . .

[Stepfather] has done what he thought was best for [O.H.] in seeking help to understand how to comfort her. He gets along well with [maternal grandmother], who is an extremely comforting figure for [O.H.] In addition to providing financially for [O.H.] and covering her with health insurance, [Stepfather] has consulted with [maternal grandmother] in discussing plans to provide for [O.H.'s] education after high school. [Stepfather] has been consistently involved with [O.H.'s] academics, including

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[7] The maternal grandmother lives in close proximity to Stepfather's home.

homework, and her school, extracurricular and community activities. [Father], on the other hand, did not testify to having made any financial preparations for [O.H.'s] future and has had limited contact with [O.H.'s] school. [Father] does not get along with [Stepfather], [maternal grandmother], or [A.D., mother of O.H.'s best friend], and, has engaged in an angry tirade with [P.D., O.H.'s best friend]. [Father], further, did not know [O.H.'s] teachers, her other friends' parents, or, her coaches, and, he expressed dissatisfaction with [the pastor of her mother's church].

[Stepfather] is agreeable to take [O.H.] to [her mother's church], where he had, on occasion, attended. . . . [Father] referenced his religious beliefs throughout his testimony. Although the evidence indicated that [Father] had attended different churches, not having consistently attended any particular church over the last several years, the only church with which [O.H.] felt a connection was that served by [the pastor of her mother's church]. [A] desire to impart a religious belief system, and related moral principles, is a positive goal in serving the well-being of a child. However, the lack of credibility of [Father], the disconcerting evidence surrounding [Stepmother's mother] and her discussions/letters with/to [O.H.] associated with religion,[8] and, the activities in

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[8] The trial court found that Stepmother's mother wrote letters to and had discussions with O.H. regarding the custody case which it found to be disturbing in the context of a custody case involving

[Father and Stepmother's] household to which [O.H.] and [P.D., O.H.'s best friend] had testified[9] raise some concerns about the sincerity of [Father] and the impact of the various activities/discussions upon [O.H.] Similarly, the manner by which [Father] and his wife will act toward, and, talk about [Stepfather] and [maternal grandmother] in [O.H.'s] presence, in light of their past conduct, is cause for concern. Despite requirements in prior Court orders that all parties not disparage other parties, such admonition has not been followed. The fact that some disparaging apparently occurred in the context of religion discussions with [O.H.] is particularly disturbing.

. . .

[O.H.] presented herself as a quite intelligent, deliberate and polite child who does not want to hurt anyone's feelings, but who clearly considers her primary family as consisting of

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a young child. Stepmother's mother directed O.H. to pray to remain with Father, discussed with her the injustice by the court system, implied Stepfather's love for her was unhealthy and an obsession, told O.H. that her life was comparable to the lives of Biblical figures, including the child threatened to be divided in half by Solomon, and that she had a need for angels, such as those with Daniel in the lions' den, due to the custody case.

[9] According to O.H. and P.D., while at Father's home they were told to pray for O.H. to remain with Father, P.D. was told that she was selfish if she did not join in the prayer, and Stepmother told P.D., who is Lutheran, and O.H., who believes she is Lutheran, that Lutherans are stupid.

[Stepfather] and his family, and her home to be in Hegins.[19] As Dr. Thomas testified, [O.H.] has suffered a tremendous loss and finds comfort with the people, places and things that involved [her mother]. . . . Her reasons for desiring to live with [Stepfather] are entitled to great weight, as they were expressed thoughtfully, are reasonable, and, further, directly relate to assuring [O.H.'s] well-being by preventing further loss and its negative impact upon her emotional health.

[Stepfather] and [maternal grandmother] have extensive family who support [O.H.] The Court learned little about any family network surrounding [Father], besides that of his wife, child and mother-in-law, the latter who [Father] now desires the Court to believe will have limited, or at least supervised, contact with [O.H.] in the future.

. . .

The Court has considered the likelihood that [Father] and/or [Stepfather] would foster a relationship between [O.H.] and the other. All reliable evidence indicates that it is highly unlikely that [Father] would foster any relationship between [O.H.] and any other person in this case, including [Stepfather] or [maternal grandmother]. Despite his testimony to the contrary, [Father] consistently claimed

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[19] O.H. testified that she would like to live with Stepfather and to visit Father at his house two weekends per month.

previously that he wanted no contact to occur between [O.H.] and [Stepfather]. Not only had [Father] expressed such position, but so did his wife and his mother-in-law. [Father's] claimed change of heart, similar to that of his wife's, is unbelievable. As noted previously, the proposed custody decree which [Father] submitted for the Court to adopt includes no provisions for [O.H.] to see [Stepfather] at all.

On the other hand, the demeanor, conduct and testimony of other witnesses, including the testimony of Dr. Thomas, indicate that should primary custody be placed with [Stepfather], he and [maternal grandmother] would be willing to cooperate with each other and with [Father], and, would pose no impediment to the relationship between [Father] and [O.H.] The only impediments that will arise are those that may be expected to be caused by [Father].

. . . Although [Father] had indicated that his wife had obtained a job to pay bills and to provide insurance, at the end of the trial, [Father] claimed that she was pregnant and at some time in the future would be leaving her job. As [Father] has not provided health insurance for [O.H.], he previously did not consistently provide financially for her, and as the evidence indicated that he has contributed nothing toward her clothing, medical or school expenses for nearly two years, it is unknown what the impact of his wife's quitting her employment may be on the financial situation in his household. Although [Father] had left his home . . . due to a foreclosure, moved to a home

of [his mother-in-law], and then, moved to his current two-bedroom apartment, he claimed that he intended to seek a larger residence with the anticipated birth of this third child. Whether he will actually do so, and the nature of such a residence cannot be reliably determined at this time.

It would also be anticipated that, should [O.H.] live primarily with [Father], [O.H.'s] best friend, [P.D.], would not visit her. This finding is based on [A.D.'s, mother of P.D.], testimony about the angry phone messages and calls from [Father] and [P.D.'s] testimony about her having been told that she had been selfish, the derogatory remarks that had been made about Lutherans and, [Father] having screamed at [P.D.], causing her to cry, to be afraid of him and to be on the verge of tears in court when testifying about his phone call to her.

The evidence overwhelmingly establishes that placing primary custody of [O.H.] with [Stepfather] has promoted and will promote [O.H.'s] interests academically, physically and emotionally. Further, her spiritual needs will best be served by her residing with [Stepfather]. By residing with [Stepfather], [O.H.] may maintain contact with her friends, her comforting relationships, and she may attend her church. Under all circumstances, the emotional trauma which [O.H.] likely will suffer should she be removed from her [Stepfather's] home is unacceptable. This determination is

> based on all reliable evidence with particular weight placed on Dr. Thomas'[ ] testimony.

Trial Court Opinion, 04/08/09, at 81-88.

Upon review of the testimonial evidence, we conclude the record supports the trial court's findings. We further find the trial court considered all appropriate factors in determining O.H's best interest and reasonably concluded convincing reasons appear that O.H.'s best interest will be served by an award of primary physical custody to Stepfather. ***See Cardamone v. Elshoff***, 659 A. 2d at 583 (starting the express wishes of a child constitute an important factor that must be carefully considered in determining the child's best interest); ***see also Charles***, 744 A.2d. at 1258 (finding the trial court did not abuse its discretion in awarding primary custody to stepfather, as opposed to the child's biological father, where the court found that the child felt most at home with the stepfather, who he has known as "dad or daddy" since he was a baby, and, considering the recent loss of his mother and his half-siblings, uprooting the child from his home, school, and the man he considers his "dad" could prove devastating to the child's present mental condition). We specifically note the trial court's finding that Father expressed anger towards many people is supported by the record and we find no error in the weight the trial court accorded this evidence. Additionally, to the extent Father's argument raises issues of credibility and weight of the evidence, we must defer to the findings of the trial

court.[11] ***See Saintz***, 902 A.2d at 512. Therefore, Father's final claim fails.

Order affirmed.

Judgment Entered.

/s/
Deputy Prothonotary

Date: December 21, 2009

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[11] The trial court found the testimony offered by Father, Stepmother, and Stepmother's mother to be "rather troubling due to the lack of credibility exhibited by each, their frequent failures to directly answer questions posed to them, and, their obvious attempts to obfuscate." Trial Court Opinion, 04/08/09, at 71.

APPENDIX B

COURT OF COMMON PLEAS OF SCHUYLKILL COUNTY--CIVIL ACTION-LAW

NO. S-1298-2007

IN CUSTODY

[Filed April 8, 2009]

KENT DEETER,
Plaintiff

vs.

ERIC S. HARNER,
Defendant

and

SANDRA LEE COONEY,
Defendant.

Karen E. Rismiller, Esquire - for Plaintiff
David R. Dye, Esquire - for Defendant Harner
Lori Schafer Guzick, Esquire - for Defendant Cooney
Maryann Conway, Esquire - counsel for Minor Child

OPINION OF COURT

RUSSELL, J.

This custody action was initiated by Plaintiff Kent Deeter (Deeter), the step-father of the child, Olivia Harner (Olivia). Defendant Eric Harner (Harner) is the natural father of the child and Defendant Sandra Cooney (Cooney) is the child's maternal grandmother. Deeter had been married to the child's natural mother, Karen Deeter (Karen), at the time of the latter's death on May 23, 2007.

Upon separate motions filed by Deeter and Cooney - which Harner opposed - the Court appointed counsel to represent Olivia. It had become apparent, in light of various actions and continued expressed animosity - in particular, by Harner directed at both Deeter and Cooney - and, the impact upon Olivia, that the child's interests needed to be independently represented.

Following numerous proceedings before the Court, the custody conciliation officer and the custody hearing officer, including pre-trial conferences and the completion of custody evaluations, trial was scheduled for November 12th through November 14, 2008. The dates were selected to accommodate the schedules of counsel and trial witnesses, and, to receive all testimony on successive trial days. However, as testimony was not finished on the last scheduled day of trial, the case was continued in progress until November 21, 2008, which was the next available Court date conducive to all parties' schedules. Because additional trial days were, thereafter, necessary to receive evidence, the trial was continued, with additional testimony received on January 21, 2009 and January 22, 2009. At that time, counsel for Olivia requested to supplement the trial record with the

transcript of a contempt proceeding that had recently been held before a custody hearing officer. The Court agreed to keep the record open until submission of the transcript.

Although the Court previously had directed the parties to submit written post-trial filings, including, inter alia, proposed decrees, immediately at the end of the trial, at the request of Harner's counsel - to which other counsel agreed - each party was directed to submit his/her post-trial filings within 10 days after receiving notice that the record had been completed with the filing of the contempt transcript. The transcript was subsequently filed, and the post-trial filings of the parties were submitted, all of which have been reviewed by the Court.

FINDINGS/ANALYSIS[1]

Evidence at trial established that Karen had been previously married to Harner, separated from him in April, 2001, and divorced on April 14, 2004. Olivia, born January 21, 1998, had been three years old when the separation occurred. In July, 2004, Karen met Deeter and in February, 2005, she and Olivia moved into Deeter's home in Hegins, Schuylkill County. Karen married Deeter on March 25, 2006.

Shortly after the birth of Olivia, Karen was diagnosed with primary schlerosing cholengitis, a

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[1] The latter part of this Opinion, captioned "Discussion," also includes some factual findings by the Court. This observation is made so that it is understood that the Court's factual findings are not limited ta being contained in the initial part of this Opinion.

disease affecting her liver. Karen suffered from the disease during the balance of her marriage to, and separation from Harner, and, throughout the entire time of her marriage to Deeter. Karen died from complications related to her disease on May 23, 2007.

At the time of Karen's death, Karen and Harner were exercising custody of Olivia pursuant to an order dated June 28, 2001 (which had approved a custody stipulation), as modified by a later order of November 14, 2003 (which had also approved a custody stipulation). Essentially, the custody orders provided for Karen to exercise primary physical custody of Olivia and (as of the latter order) for Harner to exercise partial physical custody of Olivia every other weekend and every Wednesday evening for two and one-half hours.

Many witnesses were called to testify at trial by Deeter, Harner, Cooney and Olivia. The evidence found relevant and detailed hereafter revealed that Deeter and Cooney maintain a good relationship and Deeter and Cooney are very close to Olivia, who considers Deeter and his family to be her family. Olivia strongly desires to live in Hegins with Deeter and his daughter from a prior marriage and to maintain her schedule of activities and network of friends in Hegins. The Deeter and Cooney families consist of many members living in or near Hegins. Olivia cares about her father, Harner, and his wife and their child and desires to maintain the same contact that she had with her father as existed at the time of Karen's death.

The trial evidence was extensive and the best recollection of the Court is utilized in setting forth

herein that information believed most relevant to the pertinent issues. Testimony which may have been deemed incredible, cumulative, immaterial or not particularly relevant may not be included. The evidence set forth hereafter is generally preceded by the name of the witness who provided the information; however, some evidence found reliable, but not elicited from the particular identified witness, may be included under his/her name, if relevant to his/her status or relationship to others or the case.

Joy Header. Joy Header is director of special education services at Tri-Valley School District. Header, who had been Karen's best friend, is close to and knows Olivia very well. Header has numerous responsibilities in her school position, is part of the child-study team, monitors students for difficulties and obtains instructional support, outside agency assistance or emotional support for children, if necessary.

Olivia attends the Tri-Valley School District, which has a total of about 900 students. Two elementary buildings exist for kindergarten through sixth grade students. The Hegins-Hubley building, which Olivia attends, has about 300 students, with two fifth grade classes - one with 24 and the other with 23 students. Olivia is in fifth grade and has been enrolled in Tri-Valley since the spring of her first grade. Prior to enrolling in Tri-Valley, Olivia took a tour of the school and Karen talked to Header to determine whether it was a "good" school. Olivia had known several students, including Header's two daughters, the school principal, and Header, before she enrolled in Tri-Valley. After Olivia began attending Tri-Valley, she

frequently saw Header, who taught at the school and, on occasion, took Olivia home after school.

During Olivia's attendance at Tri-Valley, the emergency contact persons identified in Olivia's school files have been as follows: Deeter or Cooney (first grade); Deeter or Deeter's mother (second grade); and, Deeter's mother or Cooney (third, fourth and fifth grades). Various other documents maintained by the school establish that Deeter made frequent contact with the school and indicated a supervisory or responsible-party interest in Olivia. These documents include health history forms, which Deeter completed in 2007 and 2008, and, report cards, tests and homework that Deeter signed, essentially, as Olivia's parent. In general, personnel of the rather small Tri-Valley School, who know the parents of the students quite well and communicate frequently with parents via telephone, e-mail and notes, were aware that Deeter was an interested adult in Olivia's schooling. In the past, Deeter participated in academic meetings about Olivia, including Meet-the-Teacher nights and parent-teacher conferences, and attended Olivia's various school-related activities, such as concerts.

Following the death of Karen, Tri-Valley School personnel, at the request of Deeter, monitored Olivia and watched for signs of academic or emotional problems. Although teachers and administrators kept "close tabs" on Olivia at Deeter's request, they determined that no need existed for a counseling referral. Deeter did not ask school officials to do anything specific, as far as providing services for Olivia. Rather, he requested that Olivia be monitored and, if any problems arose, that he be contacted.

Olivia has done well academically each year while at Tri-Valley and has not had many absences from school. In fact, as of the first day of trial, Olivia had no absences from school for the current school year.

Olivia has a close relationship with Header, who also had been Karen's supervisor for a short time while both Header and Karen, who had been a school teacher, taught at Williams Valley School District. Olivia talked about Karen's illness with Header while Karen was alive, and, Olivia has talked to Header about Karen since her death. In her discussions with Header, Olivia frequently mentions Deeter, such as when discussing humorous matters.

Header finds Olivia to be very athletic and outgoing and that Olivia likes to be with her friends, of which she has many. Olivia had previously participated in cheerleading, which Header said Olivia had "loved," but, more recently. Olivia told Header that she was no longer engaging in cheerleading because she did not think that Harner would take her to the games. Similarly, when talking to Header about her possibly engaging in basketball, Olivia seemed excited about the sport, but sadly expressed that the games were on weekends and she would be with Harner. Header knew that Olivia had participated in basketball and softball and that Deeter had attended many of Olivia's softball games prior to and after Karen's death, that Cooney had attended most, if not all, of the games, and, that Harner had attended infrequently.

Harner has acted in a manner so to discourage Olivia's participation in sports by, inter alia, not attending her activities regularly, by exhibiting anger at her events, and by pressuring Olivia to say that she

did not desire to engage in the activities. These findings are based on evidence received from Header, combined with credible evidence elicited from numerous other witnesses.[2]

Header has observed a change in Olivia's demeanor when Harner is in her presence. Generally, in Header's opinion, Olivia appears happy when in Deeter's or Cooney's presence. Header describes Olivia, when interacting with Deeter, as appearing comfortable, happy and excited. When Header has seen Olivia with Harner, however, Olivia has appeared to Header as withdrawn, subdued and quiet - as if, in Header's opinion, Olivia was like "two different people."

Header has found Deeter to have been deliberative in acting in matters of importance for Olivia, including when he tried to determine whether he should take Olivia to see Karen during her last hospital stay, when Deeter organized a support system to be in place prior to telling Olivia about Karen's death, and, when Deeter called Header several days after Karen's death to make sure that Olivia was doing "okay" in school. Deeter had been in contact with Header about Olivia

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[2] On one occasion, Header witnessed Harner tell Olivia that she could not participate in a team celebration because "We've been here long enough." On another occasion, after Olivia's basketball team had advanced to play a tournament game, Header heard Harner's wife yell at Olivia, "No, we're not coming back. This is enough." then, saw her grab Olivia by the arm and take her out of the building. Although Cooney was present at the tournament game to see Olivia play, Harner did not return Olivia, who had also won the opportunity to represent her team in a foul shooting contest, which she was then precluded from doing.

prior to and after Karen's death, while Harner did not contact Header at all.

Header expressed concern that if Olivia would be transferred from Tri-Valley School, she would be upset socially and emotionally, as Olivia had an established routine and friends. Further, Header believed Olivia, who is involved in band, chorus and sports, has a strong support system with her friends.

Header has seen Olivia at family, school and extracurricular activities and has seen Olivia with Cooney - whom Header termed as a "fixture" at Olivia's games - at sporting events, Grandparents' Day at school, and the spring concert. Header knew that Cooney has been involved with Olivia throughout Olivia's life.

Carol Stehr. Carol Stehr taught Olivia in fourth grade at Tri-Valley. Olivia was advanced in computer, very skilled at keyboarding, and played the clarinet. Stehr met with Deeter the first month of the school year at Meet-the-Teacher night and after the first marking period at the parent-teacher conference. Stehr met with Harner only once - at the last conference. Throughout the entire school year, Deeter signed all of Olivia's permission slips, homework and test papers for Stehr's class, while Stehr received no communication from Harner during the year. Olivia was always on time for Stehr's class. Stehr found that Olivia dressed appropriately, her homework had been completed and she appeared well-fed, alert and rested.

In light of her experience, Stehr believed that Deeter, whom she thought of as being Olivia's parent, was the interested adult necessary for her, as a

teacher, to contact about Olivia. A close working relationship existed in the school, involving the nurse, principal and Header, the latter who had asked Stehr if she believed anything was necessary to help Olivia. Stehr, however, did not see any problems in Olivia after Karen's death and did not believe that counseling for Olivia had been necessary.

Debra Barry. Debra Barry is Olivia's fifth grade teacher. Olivia is a good student and on the honor roll. Deeter signed her report card, came to the parent-teacher conference and Meet-the-Teacher night with Barry. Harner did not attend the latter, but did attend the last conference with Barry. Barry had had contact with Deeter on a weekly basis during the entire school year up to the time of her trial testimony, but she had received no communication from Harner until meeting him at the conference. Olivia has always been on time for school, is dressed appropriately, has her homework completed, and appears to Barry as well-fed, alert and rested.

Barry would contact Deeter in an emergency involving Olivia, as until the Monday before the trial, Deeter had been the only "parent" of Olivia known to Barry that she had ever met or with whom she had been in contact. In fact, Barry thought it unusual that Harner had asked for a copy of Olivia's report card during his only meeting with her, as a copy of the report card had been previously mailed to Harner. It appeared to Barry that Harner had not seen or been aware of the contents of the report card. Additional trial evidence established the latter to have been the case.

Kent Deeter. Deeter was born August 13, 1965, is 43 years old, and has lived in Hegins all his life. His parents live next door to him. Deeter was married once prior to his marriage to Karen, and has two daughters - Deanna, age 24, and Kylene, age 20. After Deeter divorced in 2001, he raised his daughters in his three-bedroom home. Deeter is close to his daughters. Kylene is a teacher's aide and lives at Deeter's home, while Deanna is soon getting married and resides elsewhere.

Olivia has her own bedroom in Deeter's home. Olivia and Kylene picked the color of the paint for the room, which Olivia painted with Deeter. Olivia has photographs of herself and Karen on a stand by her bed, together with Karen's majorette baton and a crown.

One room in Deeter's home is decorated and organized as a pretend school room. The room contains Karen's desk and school-room type items and decorations, including posters from Karen's classroom. Olivia and her best friend, Paige, like to conduct school by playing teacher, with Olivia wearing her mother's shoes. Their students include Ruby and River, the children of Deeter's brother Scott, who live about one-half mile from Deeter's home and whom Olivia considers as her cousins. Olivia, who greatly admired her mother, enjoys school and would like to become a

school teacher,[3] conducts "school" regularly in her school room.

Deeter met Karen in July, 2004 and he met Olivia in October of that year. Karen and Olivia moved into Deeter's home in mid-February 2005. At the time, Deanna was in college and Kylene was at home. Deeter married Karen on March 25, 2006, at the Good Shepherd Lutheran Church in Ashland. Reverend Pastor Dana Heckman Beil presided over the service.

Deeter has maintained steady employment since graduating from high school in 1983. He currently works for Kuharchik Construction, generally leaving home at six o'clock in the morning and returning by six o'clock at night. Deeter works forty hours a week – usually four ten-hour days, Monday through Thursday – and has Friday off. Deeter also has a seasonal lay-off each year. While Karen was alive, both Deeter and Karen did household chores, including cleaning the house, shopping, laundry and cooking. Deeter had been accustomed to doing housework, as he had raised his daughters.

On Fridays and when laid-off from work while he was living with and married to Karen, Deeter would get Olivia ready for school and on the bus, pack her lunch, get her school work in order, and take care of her after school. Deeter or Karen would help with Olivia's homework, with Deeter usually doing the

[3] At the end of the trial, Olivia indicated she also might desire to become a lawyer. It was apparent to the Court during her testimony that Olivia felt comfortable with and admired her attorney.

math, as that is what Olivia had desired. At the current time, Olivia continues to seek Deeter's help with her homework. Presently, on the days that Deeter works, he wakes Olivia up for school and takes her to his parents' home, where she meets her "cousins," Ruby, River and Luke, before getting on the bus which stops at the home.

Before Karen's death - except during lay-offs and on Fridays when Deeter was at home - Kylene would take Olivia to Deeter's parents' home on school mornings, and, Deeter's parents would put Olivia on the bus. Olivia would get off the bus at Deeter's parents' home after school, go to Deeter's home to take care of her dog, Charlie, and then go back to Deeter's parents' home until Deeter or Karen returned home from work. Currently, Olivia goes to Deeter's parents' home or to the home of Deeter's brother and sister-in-law, Scott and Robin, after school. Olivia generally goes to Scott and Robin's home on Mondays and Thursdays, as she desires to visit them and her "cousins," River, Ruby and Luke. Olivia has band practice on Tuesdays, after which Deeter's parents retrieve her. On Fridays, Olivia goes directly home, as Deeter does not work that day.

In the evenings after he returns from work, Deeter and Olivia talk, work on homework or do activities in the rec room at Deeter's home. After she may have something to eat, Olivia gets ready for bed - often wearing Karen's t-shirts, which she likes to do - and then calls to Deeter for him to say goodnight. On Fridays, Deeter provides all care for Olivia before and after school.

Deeter's parents have 18 grandchildren, all of whom they have babysat. Mrs. Deeter is in good

health. Olivia enjoys Deeter's parents and is watched by them in the summer while Deeter works. Olivia's friend Paige visits Olivia generally every day in the summer and they frequently swim in Deeter's parents' pool with River and Ruby.

Deeter earns about $40,000.00 to $45,000.00 per year. Most of his work is located within one hour from his house. Although Deeter had worked longer hours in Dubois for three-day weeks (Monday to Wednesday) for a limited period of time, Deeter expected that job to be completed shortly after his trial testimony. When necessary, due to the Dubois work schedule, Olivia spends a night with Cooney, Scott and Robin, Deeter's parents, or, with the family of her best friend, Paige.

Deeter has always been involved in Olivia's sporting events, originally taking her to gymnastic practices and events in Ocean City and Hershey Park. When Olivia started to play softball in first grade, Deeter attended most home games and took her to and transported her home from practice. Olivia's other friends' parents often shared and continue to share in providing transportation for sporting events. Deeter previously attended Olivia's cheerleading at mini-bull dog football games on Sundays, while Harner did not attend the games. Deeter knew and knows Olivia's softball and basketball coaches and Olivia's favorite sports, and, he was involved in Olivia's fundraising obligations, including selling tickets and delivering cookies for Girl Scouts. Deeter knew Olivia's teachers and he or Karen went to all parent-teacher conferences, with Deeter only missing one Meet-the-Teacher night. Deeter went to Olivia's class plays in second and third grades, her concerts in fourth grade, purchased Olivia a clarinet for band and has attended

every school activity since Karen died. Deeter also packs Olivia her lunch if she does not like what is on the menu at school.

Deeter and Olivia like to engage in numerous activities. Deeter takes Olivia to other children's homes to play and has shopped with her to buy a bike and gifts for others, including Karen. Deeter and Cooney bought Olivia a four-wheeler which she rides when she and Deeter go four-wheeling at their home or on Scott's farm. Olivia enjoys watching Deeter race lawnmowers for his tractor club. Karen designed the t-shirt for Deeter's club, which Olivia likes to wear. Deeter also taught Olivia how to mow the lawn.

During Deeter's marriage and while living with Karen prior thereto, Karen was often sick or suffering from her condition. In addition, Karen underwent periodic invasive medical procedures, after which she was hospitalized or recovered at home in bed for several days at a time. Throughout Karen's frequent bouts, Deeter took care of Olivia. This care included cooking, cleaning, laundry, helping Olivia with her homework, and, taking her to and/or attending her sporting events and activities. Harner had always been aware of Karen's illness and condition, as she had suffered during her marriage to Harner. When married to Karen, Harner had obtained help from Cooney to provide care for Olivia when Karen became too ill to provide the care. Harner believed that Deeter had been providing such care for Olivia after she began to live with Deeter.

While Karen was living, Harner never objected to Deeter acting as a parent to Olivia, despite believing Deeter had so acted. Although when Karen was well,

she did the majority of child care, Deeter handled child care for Olivia during the regular periods that he was laid-off, on Fridays - his day off from work, and the frequent periods when Karen was sick. Deeter made medical decisions for Olivia when Karen was not available, has Olivia covered on his health insurance, paid and pays the household bills, including mortgage, real estate taxes, heat, utilities, television cable and telephone. Both he and Karen paid expenses for clothes for Olivia during Karen's life.

Deeter knew that Harner had been in arrears in child support for Olivia at some time while Karen was living. The record establishes that Harner had been held in contempt of court and spent time in jail for failing to support Olivia. Harner knew that Deeter would be supporting Olivia when he was not providing support. Harner last made a support payment for Olivia on April 12, 2007, about six weeks before Karen died. After Karen's death, Deeter never pursued a support action against Harner, who has also never paid any voluntary support to Deeter. Deeter pays all costs for "everything" related to all of Olivia's school lunches, trips and registrations, gifts for others and, her own shopping, including clothes. Harner has never offered to pay for anything for Olivia.

Deeter has Olivia covered by his health insurance and first learned in June, 2007, through Harner's testimony at a hearing, that Harner had no health insurance on Olivia. Deeter satisfies all co-pays for Olivia's doctor, prescription, dentist and eyeglass bills. Deeter took Olivia to the eye doctor at the end of fourth grade. As her eyeglasses were not fully paid by Deeter's insurance, he paid the balance. Harner has

paid nothing toward Olivia's medical care, including physician, dentist or eye doctor costs.

Deeter talked to Cooney and Header about whether Olivia should see Karen in the hospital during her last illness. He also discussed how to handle field day at school - a particular special events day at school for Olivia, which occurred the day after Karen died - and, how to tell Olivia about Karen's death. Deeter arranged to have a large group of family - including his parents, sister and Pastor Dana (the pastor of Karen's church who had married Deeter and Karen) - at his home when Olivia was told.

Harner called Deeter's home for Olivia only twice prior to Karen's death but had called the morning of field day. Deeter found it very unusual that Harner had called and feared that he might take Olivia from school. Harner called Deeter's home later in the day, making Olivia very upset and resulting in Deeter's girls crying and Olivia crying. Harner told Deeter that he was taking Olivia from Deeter's home before Karen's funeral. Harner then agreed to permit Olivia to finish the last few days of the school term in Tri-Valley. When Harner, thereafter, retrieved Olivia from Deeter, however, Harner told Deeter that he was planning to move to a cabin and to have Olivia home-schooled. Deeter became worried and felt that Harner did not know Olivia, as Olivia's "life" was school.

Deeter talked to his one daughter's professor, whom Deeter understood to be a leading figure in handling grief. Deeter was advised of problematic warning signs to look for in Olivia and to seek counseling if such were observed. Deeter did so, but, observing no such signs, did not believe counseling was

needed for Olivia with regard to Karen's death. Deeter also talked to Pastor Dana, Header and the school psychiatrist, for help with Olivia. Deeter does not want Olivia to be forced to talk about Karen and believes she is the type of girl who will let him know when she is ready to talk.

Deeter did not have Harner involved in telling Olivia about Karen's death, as he knew about the tension which had existed between Harner and Karen and did not want any more tension placed on Olivia at the time, as his focus was on Olivia's well-being. Deeter had significant concern for Olivia at the time, acknowledging that he had cried for himself and then he had cried for Olivia for days while he was in Philadelphia with Karen during her last illness.

Olivia likes Pastor Dana and enjoyed attending Pastor Dana's church. Olivia went to church regularly with Karen and desires to attend Pastor Dana's church, the Good Shepherd Church in Ashland. Deeter went occasionally to the church and knows that church was important to Karen. Olivia went to Bible school in the summer of 2008 with Robin and she always went to Bible camp with Karen. At the time of trial, Deeter could not take Olivia to church, as he then exercised no custody of Olivia on weekends. However, Deeter would like to take Olivia to church with Pastor Dana. (During the pendency of this case, and following a hearing before a custody officer, Harner was granted partial custody of Olivia to be exercised every weekend. Following the trial testimony, however, the Court modified the weekend schedule to provide Deeter custody of Olivia on two weekends per month.)

Deeter and Harner do not enjoy a cordial relationship. Many episodes of Harner's displays of anger were described at trial, including those directed at Karen, Deeter, Cooney, Paige Doyle's mother and the child, Paige. Deeter finds that Harner, who usually calls Deeter derogatory names, is hard to talk to. The first time Deeter had met Harner, the latter had refused to return Olivia to Karen on Christmas. When Deeter and Karen went to retrieve Olivia that day, Harner walked out of the house with Olivia, screaming at Karen. Although Harner will not talk to Deeter, Deeter's wife, Joy, has engaged in some limited communication with Deeter. However, rather recently when Deeter had tried to talk about changing the custody schedule due to his work schedule in Dubois, she told Deeter "there will be no deals made."

Karen had difficulty speaking to Harner when Deeter and Karen were married. Now, Harner usually screams and hangs up if Deeter is on the telephone. Olivia has told Deeter that Harner has said fifty times that Deeter does not love her and that Deeter "is lying if he tells you that." Harner calls Deeter a liar and a cheat and has done so directly to Deeter. On Deeter's delivering Olivia to Harner's home on one occasion after Karen's death, Harner ran outside and screamed at Deeter. As Deeter was leaving with his daughter, Kylene, and Olivia's friend, Paige, Harner "whipped the finger" at Deeter.

In July, 2007, Deeter delivered Olivia for a visit with Harner at the latter's home in Duncannon. Harner had, apparently, left a message on Deeter's answering machine that Deeter had not received, which indicated that Harner wanted Olivia delivered to Tower City, rather than to Harner's home. Upon

Deeter and Olivia reaching Tower City, Harner came out of a home screaming and cursing. Olivia was "petrified" and ran into the home.

At the end of the basketball season in late winter, 2008, Harner approached Deeter in Minersville after a game, asking if Deeter was trying to "steal" a child who had been sitting with Deeter at the game. Harner then began shouting threats at Deeter, including "I'll kick your ass." Olivia, who was present, ran out of the gymnasium. Cooney and numerous parents from Tri-Valley were also present during Harner's rant.

On one occasion, Deeter allowed Olivia to spend time with Karen's first cousin. Harner became upset, claiming that he did not know the person. As Olivia had been in the cousin's wedding, Deeter found Harner's alleged lack of knowledge somewhat odd.

Deeter saw Harner at one softball game in 2006. In 2007, Deeter attended the games, as Karen did not attend and saw no games. Generally, Harner did not attend. When Harner was present at the games, Olivia appeared to Deeter to be "on edge," "robotic" and "on guard."

Although Deeter, generally, does not have to discipline Olivia, he has done so by grounding her. Olivia has chores at Deeter's home, with the main chore being to take care of Charlie, her English Bulldog. She must let Charlie outside after school, feed and water him. Karen and Olivia wanted a bulldog when they moved into Deeter's home. Deeter, Karen and Olivia went together to purchase Charlie. Deeter and Karen paid for Charlie, which Deeter thinks is registered in Olivia's name. Olivia considers Charlie

"her" dog and as a "best friend" - although another dog also lives at the Deeters' home.

Karen is buried at Robin's mom's farm about one-half mile from Deeter's home. Deeter and Olivia go to the gravesite frequently - generally two or three times a month - by four-wheeler and often at Olivia's request. Olivia and Deeter make sure "everything is nice," plant flowers, change flowers, weed the area, and spend time at the site. Olivia placed a bulldog statue at the site and is comforted when going there. Deeter and/or Olivia suggest various times to each other to visit. Sometimes Kylene, River and Ruby also accompany Olivia to the site.

Deeter calls Olivia his "daughter." Olivia calls him "Kent," but introduces him to other people as her step-dad. Olivia calls Deeter's siblings her "uncles" and "aunts," she calls Deeter's nephews and nieces her "cousins," and she calls Deeter's parents, "mom-mom" and "pop-pop." Olivia has had frequent and regular contact with the extended Deeter family - Deeter's brothers, sisters and their children - since they met. Kylene and Olivia get along well, they play games on the computer, walk Charlie and do various activities together. Deeter and Olivia have holiday routines, visiting Cooney and Deeter's parents on Christmas, Thanksgiving and birthdays. The Cooney and Deeter families have celebrated events together both before and after Karen's death.

Olivia had been a cheerleader, but Deeter assumed she did not go into cheerleading this year because she is with Harner on weekends. Nevertheless, Olivia went to cheerleading practices with River and Ruby. Olivia started basketball the week of November 3, 2008. Her

practices are on Tuesdays, Thursdays and Saturdays, and the games are on the weekends. Deeter knows Olivia's teammates, their parents and her coaches, and he takes Olivia and her friend Paige to practices. Many of the children in Olivia's class at school are engaged in her sports activities. Olivia's softball games are usually held during the week, while football (for cheerleading) and basketball games are on weekends. Deeter finds that sports are important for Olivia, with regard to matters such as learning responsibility, and, because the friendships developed in sports are different from those developed in school.

Deeter takes Olivia to a doctor in Valley View. Olivia had gone to another doctor previously, but Harner retrieved her medical records and tried to obtain the records of her dentist. (Despite his obtaining records, the evidence indicated that Harner, thereafter, did not take Olivia to any doctor, dentist or eye visits.) As Olivia's prior doctor would not accept Deeter's insurance, he took Olivia to Dr. Lupold in Hegins, where Olivia had been previously with Karen. While Karen was alive, Deeter had taken care of Olivia when she got sick, if he was at home and Karen was at work, and he had also taken Olivia to the doctor.

Deeter talks to Olivia about various matters, including Karen, usually between eight o'clock and nine o'clock at night. The last time Olivia had been emotional about Karen occurred about two months prior to Deeter's testimony at trial. When these occasions arise, Olivia cries, Deeter hugs her and they talk about their feelings about Karen. Deeter has asked Olivia if she wanted to talk to anybody else about Karen and Olivia has replied, only Pastor Dana, and only if she had to do so. When Harner took Olivia

from Deeter's home after Karen's death, Deeter asked Pastor Dana to contact Harner to check on Olivia. Pastor Dana tried unsuccessfully. Harner became upset upon receiving the call from Pastor Dana and prevented any contact between the preacher and Olivia.

Deeter would like to be awarded primary physical custody of Olivia, with Harner to exercise partial custody every other weekend, as provided by the prior order. Deeter desires to exercise legal custody and do all decision-making regarding Olivia, as he believes he knows what Karen wanted for Olivia and he desires to raise Olivia. Further, Deeter wants to make sure that Olivia's grades are stressed, as he did when he told Olivia that she had to make the honor roll to play basketball. Further, Olivia "dreams" to be a teacher and Deeter claims he will do "everything" to fulfill that goal. Deeter says he is not afraid to push Olivia and he finds her to be focused, in the same way as is his daughter Deanna. Deeter would encourage a relationship between Harner and Olivia, believes Olivia loves Harner, and, "knows" that Olivia loves him (Deeter).

Deeter has a good relationship with Cooney and he thinks that an ongoing relationship between Olivia and Cooney and contact between Olivia with his own family are needed for Olivia. Deeter finds that Olivia considers his family as her family, and believes that Cooney was "always there" for Olivia, with Olivia having generally seen Cooney a couple times a week. Cooney and her daughter, Kathy, go to all of Olivia's activities that they can attend. Deeter encourages Olivia to talk to Cooney by telephone. Cooney sees Olivia whenever Cooney desires, provided Olivia is in

Deeter's custody. The same contact between Olivia and Cooney that existed when Karen was alive has continued during the times that Olivia is with Deeter.

Cooney is the financial beneficiary of Karen's retirement. Deeter and Cooney have talked about the retirement money going to Olivia and have discussed financial plans for Olivia's future. One of Cooney's relatives has also talked about desiring to pay for Olivia's college education.

Deeter changed his employment so that he could properly care for and provide for his daughters when he was raising them, as he said he would do "whatever" he had to for them. Deeter holds the same mind-set with regard to Olivia. Deeter is aware that Olivia's activities may conflict with his activities, but finds it "fun to watch Olivia play" and believes her activities are a vital part of her growing up. As the parent of two daughters, Deeter found that he often had conflicts with his plans and their plans, so he frequently changed his plans. He did so, depending on the importance of the matters to him and his children. Deeter feels that he is more of a father to Olivia than Harner had been, that he has been "there" for Olivia, and, that his family is Olivia's family. Deeter knows Olivia wants to spend more time with his family and she has appeared disappointed when his family planned events that she could not attend, including a time when Robin discussed a proposed summer vacation.

Paige Doyle is Olivia's best friend. Only a day or two goes by without Olivia being in contact with Paige. Olivia often spends one night a week at the Doyles' house and Paige sleeps at Deeter's house usually every

Thursday night. Olivia has gone to Kettle Creek Camp over Labor Day with Paige for the two years prior to 2008. She desired to go camping with Paige in 2008 and Deeter agreed, but Olivia had to obtain Harner's consent. Harner refused Olivia's request, whereupon she became very upset, afraid that he would holler at her because she had asked to go camping with her friend.

In mid-September, 2008, Olivia and her friends started planning a Halloween party to be held November 1st. Olivia called her court appointed attorney in mid-September to seek permission from Harner to attend the party. Olivia's attorney sent a letter to Harner's counsel with the request. Olivia, who had helped her friends get ready for the party, had prepared party invitations and had a costume made, did not attend the party. Harner claimed that he had known nothing about the party. Harner's lawyer represented to the Court that, contrary to Harner's claim, he had advised his client of the request and had responded to Olivia's counsel, indicating that Olivia could go to one activity involving Halloween. Olivia's counsel contended that Harner's counsel had not responded to her at all. The Court is making no finding as to the credibility of counsel regarding the latter issue. The facts establish that Olivia had desired to attend the party she was helping to plan, she felt the need to ask her lawyer to obtain permission from Harner, the lawyer sought permission and Harner failed to respond, claiming that he never knew of any request.

Deeter does not expect much cooperation from Harner with arranging Olivia's schedule, due to events arising such as her games on weekends. It has been

difficult for Deeter to ask for or receive any cooperation from Harner on time changes. Similarly, when Deeter asked to change the schedule so he could go away and do something with Olivia during the time he worked in Dubois and had Thursday through Sunday free, Harner would not talk about changes to the schedule. Deeter, however, has been flexible when Harner has wanted to change the location of exchanges. Evidence indicated that Harner exhibited a similar lack of cooperation in the scheduling of Olivia's other activities, including a basketball tournament, and in scheduling matters with Cooney.

Jill Bugdanavage. Jill Bugdanavage is the mother-in-law of Harner. She claims she had seventeen foster children, which she considered as her children, and has step-grandchildren, which she considers as her grandchildren. Bugdanavage does not consider Olivia as the child of Deeter and would not support a desire by Olivia to live with Deeter.

Much of the testimony of Bugdanavage was evasive, disturbing in the context of a custody action involving a young child, and, not credible.

Bugdanavage sent Olivia a letter dated December 17, 2007 that read:

> Dear Olivia: 12-17-2007
>
> This is Grandma Jill letting you know why you got things about horses:
>
> I had arranged for the gent (just off Rte 22 across from Jonestown's Light house development) to have you pick any one of the 3

horses he has for sale over Christmas vacation. He was to keep it until we got a barn at the Annville House. I wanted to give certificate to start horse riding lessons for Birthday.

But I put it on hold a month since you are still with that man, Kent. Somehow I was under impression you were going to tell him (and ask the new Lawyer to help) get you relocated permanently by Christmas with your natural biological dad and brother?

But it is confusing to me that you want to do things up there. So if you don't get permanently with your true Harner family; I will cancel the whole deal by your Birthday.

I can wait until Jacob is old enough in another 3 years to get horse. . .

(Plaintiff's Exhibit No. 12a).

Bugdanavage sent Olivia a letter dated June, 2008 that read:

Hi Honey June 2008

Just another note to let you know I'm Praying for Movement on your being released: from Kent's "power trip" of having corrupt Schuylkill County hold you Hostage.

I know your Natural Mom, Karen, truly would want you to be loved, safe & happy. Not "split!" You do have lots of "strength" = and, you are surrounded by angels! Yours is Cyril, you'll

feel her presence. The 2 Big angels are from Archangel Warrior Michael. I'm trying to get one-like those who were with Daniel in Lion's Den for you, too.

Grandmaw
Jill

(Plaintiff's Exhibit No. 12b).

Bugdanavage has talked to Olivia about the "injustice" by the court system that has occurred in her custody case and claims to be "appalled" to think that Deeter might love Olivia or would hug Olivia, as Bugdanavage does not think such is "healthy." Bugdanavage claims she would not want to get to know Deeter.

Bugdanavage claims she and her family, including Olivia, prayed constantly, and that she saw Olivia every other weekend. She claimed they prayed when Olivia purportedly had felt ostracized by school children and had been overtired and frustrated with her sports activities, and that they prayed about the custody situation. Bugdanavage claimed she would discuss Bible stories with Olivia that she felt were applicable to Olivia's situation - such as Solomon threatening to split a child and Job's trials. Bugdanavage also asserted that Olivia had not wanted to participate in sports and that she did not want to play basketball in the winter of 2008-2009.

Bugdanavage claimed she talked to Olivia about "normal Children and Youth procedures," and the alleged "lying" by Deeter to Olivia. Bugdanavage testified that she told Olivia that her custody situation

was "not normal," was "strange," that she did not know how Deeter got "this power" over Olivia, and, that Olivia should be with her "natural dad." As stated in her one letter to Olivia, Bugdanavage promised Olivia a horse and riding lessons upon Olivia's living with Harner. Bugdanavage claimed that the alleged horse she purportedly was going to purchase for Olivia could have been taken care of by Olivia on Wednesdays and weekends, as such was sufficient time to care for a horse. Bugdanavage further told Olivia that she was confused that Olivia wanted to do things in Hegins. Bugdanavage also claimed that Harner had discussed with Olivia the alleged "obsession" that Deeter had with Olivia.

Bugdanavage prayed in Olivia's presence and had Olivia pray that she live with Harner and for patience with the justice system. Bugdanavage talked to Olivia about Deeter's "power trip," referred to the Schuylkill County Court system as corrupt, told Olivia that she was held hostage by Deeter, claimed Olivia had been "ripped out of our lives" and stated that she (Bugdanavage) did not trust Olivia's school teachers. Bugdanavage claimed that Olivia had stated that Deeter had told Olivia that if she lived with Harner, she would not see Charlie anymore, and, that Cooney had told Olivia that, in such event, Cooney would burn all of her dolls and Karen's things. In light of all the evidence, the attribution of such statements having been made by Olivia about representations purportedly by Deeter and Cooney is not found only unbelievable but outlandish.

Bugdanavage quite forcibly claimed that she finds Deeter's desire to have custody of Olivia to be inappropriate, sick and appalling. She claimed she

believes Deeter is obsessed with Olivia and that he has encouraged Olivia to be promiscuous. Bugdanavage claimed Olivia's appearance, verbiage and attitudes have changed inappropriately. Her claims, however, were not supported by any credible evidence. Bugdanavage claimed she was so fearful of Deeter that she sent Schuylkill County Children and Youth a letter, which read:

June 21, 2007-06-22

Dear Sir/Madam:

I am **reporting suspected Child Abuse and request an investigation into Kent Deeter, Hegins, Pennsylvania.** And request only supervised visitations with County representation, if he is permitted time with his stepdaughter, Olivia Harner.

My name is Jill Bugdanavage, and I am Olivia's step-grand mother. I am a certified foster parent, having many placements in 1990 through 1997, with Lebanon County Children and Youth. 17 placements normally aged 12 or older. (In confidence learned 10 of the 13 girls had been abused by step-family members or mothers' paramours.) I was also a Girl Scout Leader, Red Cross instructor, and youth group leader for church. **We were instructed by Cleona Police, social workers and during training sessions learned signs of various abuses, including sexual.** You may contact me for elaborations, weekdays where I work at Fort Indiantown Gap: (717) 861-8489; FAX (717) 861-9643.

Olivia Harner was 9 in January 2007. She has changed in the past 4 months. ***Alarm bells went off*** last week-end when she was visiting and to use our swimming pool, insisted in **wearing her skimpy 2 piece swim suit and said Kent always wants her, "baby doll" in it.** She and a friend, Paige, were **going to pull down Eric's swim trunks.** "Grand ma

Jill" challenged this action. Apparently they do this with Kent and boys! Kent has pictures of Olivia made up to look like a teen. Such facts frighten a person; there are some situations that can arise, such as when the Jon-Benet Ramsey horror was in news.

Alarm bells were triggered from awareness training of predators. I can provide more information, as this ***adult manipulation by Kent: inappropriate "swimming pool games", have a child to keep things from certain adults, no sense of modesty, dependency and isolation.*** Kent was defying court ordered custody guidelines, to jointly plan Olivia's extra-curricular activities, which has shortened the visit time on week-ends and eliminated Wednesday nights.

Eric, Joy and other family members, who often did include me, would be supportive and attend Olivia's events. In past few months, as "wrong communication" seems to be a constant, since with the step-father, this changed. This meant those who used to be close miss much that's in her life now.

Olivia was told to lie about her mother's health and times in hospitals. However, prior to this timeframe, she would share her any concerns and ask us to pray. When Olivia was a cheerleader, she changed from the hot pants and mid top and washed make-up, when natural father or family members picked her up from the events. **She then has an appropriate value system.**

When her mother Karen's death notice was in paper, some co-workers commented that knew about Kent, and recalled he used to date many women with daughters. And they wondered why **he only had one of his own daughters with him.** The alarm bell went off again when reflected the phone call to Kent about time over **Memorial week-end with Olivia. Kent's daughter,** who answered, told that Karen had passed, and those then in house were not going to tell the natural father, and **she shared some overheard comments.** If time had allowed, wonder what more **information about how devious her father is would she have said?** Kent blocked Olivia from her natural dad, and instead makes an exclusive bond during this time of grief. Karen in the past when ill asked for prayers. We would have liked to have "closure" concerning Olivia's mother Karen's death, too.

When issue over math grades needed addressed, it was the responsible parents, Eric and Joy who got Olivia, games that used math, & a blackboard to play school. Now I am concerned, as from comments Olivia had made to Grandma Jill and a cousin: "when you are so cute, it won't matter (about grades), why so much fuss?" **Kent does not enforce rules.** She has no set bedtime & eats what she wants there. **Kent appears to have an interest in Olivia for some agenda of his own.**

Missing her most is her 2 & ½ year old brother. I believe recent twist in Kent's relationship is to manipulate this beautiful

little girl. She has been coached to tell fibs to her natural father in the past months. Why did she stop talking about her Uncles, a "special needs" Aunt, and many others of her mom's family? Her mother had other male friends prior to Kent, yet Olivia never stated missed them. Olivia had shared that Kent's daughter didn't care for her being in their house and avoided her. Olivia used to make friends easily and quickly.

Thank you for your attention to this concern. I will appreciate your sharing your findings.

(Child's Exhibit No. 8) (emphasis in exhibit).

Bugdanavage came to Court with a "file" on the custody case. The impact of her conduct upon Olivia, in light of her close relationship with Harner and his wife, her demeanor and testimony is disconcerting.

Peter H. Thomas. Peter H. Thomas is a licensed clinical psychologist who has performed four to five hundred custody evaluations and is the Court-appointed psychologist in this case. He was accepted by the parties as an expert in psychology and in the provision of custody recommendations, with his testimony about his credentials, experience in custody evaluations and expertise, essentially, received without contest. As a result, further detail thereon is not deemed necessary in this opinion. In Dr. Thomas's evaluation process, he interviewed the parties, Harner's wife, Olivia, Deeter's daughter, Kylene, and Cooney's daughter, Kathleen. Further, Thomas had the parties undergo psychological testing and obtained and reviewed various records, including home studies.

Thomas evaluated the degree to which each involved adult was psychologically sound and healthy, the nature of the bond between Olivia and each adult, the capacities of the adults to be parental figures to Olivia and the degree to which Olivia is psychologically healthy. Thomas interviewed the parties and Olivia individually, observed Olivia with the parties and administered the Minnesota Multiphasic Personality Inventory - II (MMPI-II). Thomas' written report was admitted into evidence. The testimony of Thomas is found credible and reliably based on the information that he then had available to him. As his report is found reliable and accurate, it is not found necessary to detail all of the information to which Thomas testified or reported in this opinion.

Deeter told Thomas that he divorced his first wife when his children were fifteen and ten years old, and, thereafter, raised his daughters. Deeter relayed an accurate history of his relationship with Karen, his own children, and Olivia to Thomas.

Deeter informed Thomas that he believed the best program for Olivia was for her to follow the same schedule as that in effect when Karen was alive. Deeter noted that Olivia had stated that that was her desire, also. Deeter reported that he believed Olivia's life was at his home, and, that she had been very close to Karen. Deeter talked about Olivia's sense of stability in his home, the Hegins environment, her relationship network and her school, and, he was familiar with Olivia's friends. Deeter told Thomas that he felt he could offer greater stability for Olivia than Harner could, and that he could assure that Olivia would stay in her home, community and school system

and be involved with her many other family members, including Cooney.

Deeter also reported that Harner had changed jobs and moved residences frequently, indicating instability. Deeter informed Thomas that he had wanted to adopt Olivia and that Karen had discussed his doing so with Harner, however, such never occurred.

Deeter expressed concern about Harner's behavior, indicated that Harner was difficult to deal with, and that Harner had talked about home-schooling Olivia. Home-schooling, Deeter believed, would be a mistake and not good for Olivia, as Olivia was social and enjoyed school, Karen had been a teacher, and, Olivia had a sense of importance regarding school. Deeter told Thomas that he finds it very difficult to communicate with Harner, talked of Harner swearing in front of Olivia, and of their discussions escalating into destructive arguments.

Deeter told Thomas that he had a "great" relationship with Cooney, who had been involved with Olivia a long time, that they lived twelve miles apart, that Karen had frequently taken Olivia to Cooney's home to visit, and that Deeter and Cooney supported each other with regard to Olivia. If he obtained primary custody of Olivia, Deeter indicated that Olivia would maintain the same contact with Cooney as Olivia has experienced her whole life.

Deeter reported to Thomas that he graduated from high school, was, thereafter, always employed, and currently works four ten-hour days for Kaharchik Construction. Deeter does not work weekends or

Fridays. Deeter has a stable work history, no history of mental health contacts, and indicated that he had no history of drug, alcohol or police problems.

Thomas found that Deeter had a mixed personality structure with regard to emotional aspects of bonding. However, Deeter had been involved with child care functions and exhibited a steadiness and earnestness which will promote a relationship and attachment with Olivia. Although Deeter was not particularly open and expressive, emotionally, Thomas found him to be a "very nice man," having a positive tone and bond with Olivia. Further, Deeter was knowledgeable about Olivia's education history, could describe her personality characteristics and traits, and was well aware of her activities.

Olivia spoke very positively about Deeter and a positive attachment was evident in the joint evaluation. During their joint evaluation, Deeter and Olivia appeared "quite comfortable" and it was apparent that Deeter was very involved in Olivia's life with school, friends, sports and leisure activities. Olivia and Deeter interacted well and Olivia exhibited having a nice relationship with her step-sister, Kylene Deeter, who was eighteen years old when Thomas saw her. Kylene, according to Thomas, is a healthy person and exhibited no signs of poor parenting by Deeter, who had experience raising his daughters. Thomas observed that Deeter's strong association with Karen would render Deeter of importance and have emotional meaning in Olivia's life. The bond between Olivia and Deeter was found to be very positive.

Further, Thomas found the manner by which Deeter had handled Karen's death with Olivia

"impressive," as Deeter had put a lot of thought into the matter, had contacted a college professor, who was an expert in death, for guidance, discussed how to handle the situation, and then discussed the circumstances with Olivia and provided her "appropriate space." In addition, Deeter planned to have other family members present to support Olivia. Thomas understood Deeter's decision not to have Harner present at that time, as the conflict among the parties had been significant even before Karen had died.

In response to hypothetical child behavior problems, Thomas found that Deeter referenced being emotionally expressive to Olivia, did well in accessing outside resources and support, and, focused on understanding the reasons for any misbehavior. Deeter's use of judgment was good and he presented a reasonable set of skills, although Thomas felt that Deeter will be uncomfortable in difficult moments. Thomas did not believe that Deeter was an innately confrontive individual. Although Deeter appeared to have a somewhat closed emotional system, he was able to acknowledge the need to be comforting and supportive of Olivia. Deeter could elaborate goals for Olivia, focused on her developing her own interests and making her own choices and, Thomas opined, Deeter would promote Olivia's involvement in activities.

The MMPI-II, which focuses on mental status, indicated a valid profile for Deeter, with clinical scales within normal limits, and no significant psychopathology. Deeter presented without sign of thought or mood disorder. Thomas believed Deeter would be composed and steady, that he was fairly

cognitive, well organized, exercised good judgment, had average or better than average intellectual skills, was earnest and showed signs of no significant anger. Deeter's home evaluation indicated that Deeter had a single dwelling home in the country which had three bedrooms, was clean, organized and suitable for a child.

Harner told Thomas that he had married Karen in 1995, separated in April 2001, began residing with his second wife in October, 2001, and married her in July, 2004. Harner claimed that physical abuse was not a problem in his relationship with Karen, that Karen was often ill, that he would end up taking care of Olivia and that he had performed sixty percent of the child care. Harner indicated that he wanted primary custody of Olivia, and that Deeter should see Olivia one weekend a month, adding that that was "only because he has standing. I really don't want him in her life at all because of the lying and the cheating."

Harner claimed that he moved in June of 2007 because his mother-in-law wanted to sell the home in which he had been living, and, so he would be closer to his work in Harrisburg. Harner claimed that he has to be "on call" for work, which required him to live closer to Harrisburg. Harner stated that he had a two bedroom apartment, that his son, Jacob, and Olivia share a bedroom, that the apartment had a year's lease when he rented it, and, that at that time he had no expectation that Olivia would move in with him.

Harner stated that he worked for Velocity Express as a truck driver for approximately nine months at the time of the evaluations. Harner claimed that he was an independent contractor, having flexible hours and

working, generally, from 7:00 a.m. to 3:00 p.m. or 4:00 p.m., Monday to Friday, with a twenty minute commute. Harner claimed that he previously had worked at Frito Lay for two years and left and then had worked at Lowes for one year. Harner stated that he had been in the Army for six years and had worked at Alcoa for three to four years, which was his longest employment. Harner had moved residences three times in three years, which Thomas found to be a significant number of moves. When asked about problems with police, Harner denied having any DUI charge and claimed that he never had any problems with police, other than having been in jail eight days for non-support.

Harner complained that he did not know of Karen's hospitalizations and that he had heard about Karen's death through a person who had heard the news at school. Harner alleged that Deeter had threatened and yelled at him on the phone. Harner further complained that he believed Deeter had agreed that Olivia should live with Harner and that he had told Deeter that he would be willing to allow Deeter to visit Olivia. Further, he stated that "everything can't stay the same. Her mother is gone." Harner told Thomas that Deeter had lied to him about Karen and that Deeter had taken advantage of Harner's goodness in allowing Olivia to finish school in Tri-Valley after Karen died. Harner told Thomas that he believes that the "group" in Hegins is trying to take Harner out of Olivia's life, that they cannot be trusted, that Deeter was not involved in Olivia's homework or discipline, and, that he had wanted Deeter "out of the picture" entirely.

Thomas is concerned about Harner's impact on Olivia, as Harner is angry but has no expressed regard

for how his anger affects Olivia. When told that Deeter may be important to Olivia or that an attachment with Deeter and Olivia exists and a break would impact Olivia, Harner responded to Thomas with concerns about his own needs, not about Olivia's needs. Harner was intensely angry during the evaluation process, claimed his rights were violated, thought the evaluation was improper, and, was irate about a lot of people.

Harner complained that Deeter did not spend enough of time with Olivia, whom he termed "a social butterfly." Harner told Thomas that he felt Olivia was "off with her friends all the time." He also complained that the time that Cooney spends with Olivia is time "taken away" from him. Harner told Thomas that his wife had worked for Elite Staffing prior to Karen's death, then had stopped working, and, would be available to care for Olivia full-time. (Other evidence indicated that Harner's wife was working full-time at the time of trial.)

Harner first told Thomas that he had no mental health history. Then, he told Thomas that the courts had ordered him to have an evaluation, that he had seen a professional, that he and Karen were to be evaluated but he forgot what it was for, that he had compiled, went one time, didn't know the result, and, never heard any more about it.

Thomas found that Harner's personality structure was not strong for emotional aspects of bonding or nurturing, that he was fairly emotionally closed, had significant anger, was forceful and intimidating, and, relative to parenting skills, was not focused on feelings. Thomas was concerned that Harner may miss

the emotional import of the moment and that he had failed to access outside resources at times. Harner expected Olivia to behave properly in response to Harner's demands and forceful personality. Harner acknowledged yelling in some instances and, on occasion, spanking Olivia. Thomas found Harner's anger a negative factor in parenting behavior. Nevertheless, during the joint evaluation, Olivia seemed comfortable with Harner. Thomas found Harner knowledgeable about Olivia's educational functioning, that Harner had a fair ability to describe Olivia's personality structure and a positive bond with Olivia; however, Thomas observed that Harner's anger and distress were evident.

Harner's MMPI-II results indicated three validity scales in the abnormal range, reflecting a response bias of describing himself in an overly positive fashion. The test data indicated that Harner was not responding in an open and forthright manner and provided unrealistic responses. Thomas was unable to get a valid set of information about Harner, as too much response bias existed in the test data which may indicate a defect of character structure and, perhaps, a personality disorder. Thomas found that other factors could not be determined, as the degree of elevation was such that doubt was cast on the validity of the clinical scale scores, resulting in a possible underestimate of psychological dysfunction. Thomas also found that a number of Harner's characteristics were consistent with an individual with defects of character structure.

Harner presented without sign of thought or mood disorder, was angry in a very persistent fashion and focused on other adults and their alleged misdeeds.

Thomas found a significant concern existed about Harner's history of involvement in combative and angry conflicts with a number of authority figures - including the military and the judge previously presiding over his child support case. Thomas was concerned about evidence of intensive conflicts with Deeter, Cooney, other people in the case, in the court system, in Harner's support and custody cases, the judge, the custody conciliation officer and the military, which indicated a behavior pattern and personality style that fit with a possible personality structure problem.

Harner claimed that he had been honorably discharged from the Army but gave a rank that, according to Thomas, was very low for a person who had been in the Army as long as Harner had been. According to Thomas, Harner described a process in the Army relative to a driving under the influence event that was difficult for Thomas to understand, although Harner claimed that he had lost rank due to the incident and contended that his commander had treated him unfairly.

Harner talked to Thomas about Cooney "with significant anger and bitterness," claiming that she had been "behind the divorce." Harner claimed that on one occasion Cooney had jumped on the hood of his car and had "flipped me off." Thomas noted that Harner evidenced considerable animosity toward Cooney.

Thomas also noted that, "with significant anger," Harner spoke about a sense that he had been mistreated by the judge in the case involving his non-payment of child support. Harner further spoke about Deeter and those in his environment with "great

anger." Harner expressed anger that Olivia spent time with friends and "talked with significant anger toward the custody conciliation officer as well as the judge." Harner told Thomas that he was going to organize people to protest the judge's "poor behavior." Referencing the entire process, Harner spoke of trying his "hardest to expose the lie."

In response to Thomas's inquiry about Olivia's being established in her current environment with family, friends, school and other systems, and, the difficulty she would face if she had to leave, Harner claimed that Olivia was flexible and would be fine, and, then returned to venting angry statements about Deeter. Thomas found that it was not positive that Harner could not acknowledge that there would be distress to Olivia should she move. Harner provided no indication that he knew it would be difficult for, and a loss to, Olivia should she have to move. Thomas pointed to two primary concerns which he had - one, the degree to which Harner was focused on conflicts with the other adults, and, two, the intensity of Harner's anger and overriding sense of injustices. When discussing goals for Olivia, Thomas found Harner focused on the custody battle.

To protect Olivia in the long run, Thomas opined that Harner has to work through his feelings and make peace with the past. However, Thomas is not optimistic about that occurring. Thomas admonished Harner that he not display emotions or say negative things in front of Olivia, as, otherwise, she would be negatively affected and he further told Harner that it is his responsibility "to get through it." Thomas found that Harner does not express concern regarding Olivia's loss, as he simply said she can adapt. Thomas

was concerned about this, especially as Harner remained focused on conflict and exhibited a significant intensity of anger.

Thomas opined that Harner had a number of characteristics consistent with an individual with defects of character structure, including persistent anger, a history of getting involved in combative and angry conflicts with multiple authority figures, persistently communicating a strong sense of injustice and disbelief that the case was proceeding, and, a somewhat spotty job history. Further, Thomas noted, Harner was not psychologically minded or insightful. Thomas observed that in some limited instances, Harner's anger "made sense," but Thomas was concerned about the anger's pervasiveness, intensity and how many people it showed up with. Thomas was also concerned about whether it would be possible to shield Olivia from Harner's emotions, as anger is a consistent problem in Harner's life and personality. Thomas opined that as Harner's animosity is extreme and he has problems with authority, that he would feel aggrieved if primary custody was given to Deeter, resulting in a potential for his "acting out" and for continued conflict.

Thomas finds several things very troubling about Harner with the most being his degree of anger toward other adults in the case. Harner clearly expressed that he would like to entirely exclude Deeter from contact with Olivia. Thomas finds that this wish to exclude Deeter demonstrates a primary dysfunction in Harner - his animosities often dictating his decisions and actions - while Olivia's needs should be dictating his decisions and actions. Thomas believes Harner should be able to consider that Deeter is important to Olivia,

and, that that relationship benefits her. According to Thomas, Harner claims to be aggrieved but never acknowledges Olivia would need involvement with Deeter.

Thomas also found that the degree of Harner's persistent animosity toward the judge in this case, the judge in the support case and his conflict with authority figures in the military - with his sense of being treated unfairly being a long-term experience - was troubling. These elements in Harner's personality structure are a concern for Thomas, who does not feel positive about Harner's ability to promote contact between Olivia and Deeter, or between Olivia and Cooney, should Harner be Olivia's primary custodian. Thomas found Harner feels very negatively about Deeter and Cooney and does not want them to have more time with Olivia. Thomas does not expect Harner to be a "flexible promoter," or, one to encourage attachment.

Harner's wife completed the MMPI-II which revealed one validity scale in the abnormal range, suggesting that she was describing herself in an overly positive fashion. The elevated scores made interpretation of the results more tentative for Thomas, although all of her clinical scale scores were within normal limits.

Pastor Richard Williams, later learned by the Court to be Harner's friend, reported to Thomas that he had done a home study on Harner's household, which was deemed appropriate. Harner apparently never told Thomas that Williams was his friend.

Thomas found Olivia had some social skills and that she said nothing bad about anybody. Olivia was asked what her wishes were. She indicated that she wanted to obtain another dog and to be with her friend, Paige Doyle, all the time. She stated that Amy, Paige's mother, is her second mother, and, that she is Amy's additional daughter. (Deeter told Thomas that he had valued the relationship between Olivia and Mrs. Doyle, as Olivia may be able to talk to Amy about her concerns.)

Olivia also indicated to Thomas that she wished to live with Harner and Deeter. Thomas thought that Olivia was totally detached from her own needs. He opined that if Olivia can be in a relationship and "open up," that would be very important for her. Thomas believed that her not doing so is not healthy for Olivia. Thomas wanted Olivia to have insight and advocate for what she feels, as these are life skills. Thomas believed that it was important to be mindful of finding a relationship for Olivia in which she can "open up." Thomas opined that if Olivia wanted to speak to Pastor Dana, who presided over the wedding of Karen and Deeter and the funeral of Karen, he would encourage her to be able to do so, as such appeared to be a "healthy" request.

Olivia told Thomas that her best friend was Paige, she talked a lot about pets, and, talked very positively about Cooney, while she talked in a "fairly mild fashion" about Jacob. Olivia repeatedly referenced Paige, explaining that they play softball, basketball, football, go four-wheeling and catch frogs. Olivia indicated that Paige's mother was important to her and that she would miss friends, Cooney and all her aunts and uncles if she moved from Deeter's home.

Olivia said that she misses her mother and sometimes cries and goes to Cooney's house when she is sad, as seeing Cooney makes her feel better. Thomas would like Olivia to have a strong degree of availability to see Cooney, as she is the one adult with the most ties to Olivia, as far as time of involvement, being constant and important. Thomas found, in a review of records, that Olivia was functioning fairly well, was above grade level in reading, language and mathematics and consistently received good marks.

Thomas believes that Deeter's association with Karen will lend importance and emotional meaning to him in Olivia's life and that he has a very positive bond with Olivia. Although Olivia suffered severe losses, she has functioned well and been successful in school and with her friends. She has had no major developmental issues, nor any physical dysfunction, but she wants to be removed from the turmoil and responsibility for making decisions and pleasing or displeasing people. Olivia has prospered while living with Deeter, in her community and in her relationships, and, Thomas finds that Karen cannot be "taken out" of the equation.

Thomas believes that the losses Olivia may experience by moving may be costly. Olivia has been strongly attached to her sense of a world around a life with Karen and Deeter, Cooney and her aunts and uncles, her strong friendships, her community, her activities and her school. Thomas finds that Olivia's loss of her relationship with Karen is a critical emotional event in her life. The bond between Deeter and Olivia increased by their grieving and Karen's past presence makes their bond stronger. Their activities at Karen's burial site are very positive for

Olivia's health, as is Deeter's support system. The issue of loss is the dominant theme in Olivia's recent life. She is also at risk of losing her sense of attachment to her community, school, most of her friends, and, to a significant degree, Deeter and Cooney, which would be further injury to Olivia.

Thomas opined that all individuals need to understand that Karen's presence in Olivia's other relationships and her environment, imbues the same relationships, environment and personal networks with a degree of importance to Olivia. Thomas believes that Olivia feels that she maintains some contact with Karen by being involved with Cooney and with Deeter, and, in the systems and activities that Karen loved and used to participate in. The importance of these other individuals has escalated due to Karen's death.

Although Harner expressed concern that Deeter allowed Olivia to be with friends, Thomas found that Olivia's relationship with her friends is very important to her well-being. Thomas noted that Olivia and her friends have done much together for years, Paige's mother has helped with homework and engaged in activities, and, Paige and Olivia sleep at each other's home and see each other after school.

Cooney expressed to Thomas that she desired to have a lot of time with Olivia. Cooney had been significantly involved with Olivia her entire life and would help care for Olivia when Karen was sick. Cooney told Thomas that when Karen was sick and married to Harner, Cooney would take care of Olivia and make meals every day that she was not working. When Olivia lived with Deeter and Karen, Cooney saw

Olivia frequently on weekends, during the week, and more often in the summer.

Cooney said that contact between her and Olivia could be flexible and loose if Olivia was with Deeter, but would have to be court-ordered if Olivia was with Harner. Cooney told Thomas that Harner screamed all the time and that after Karen's separation from him, Olivia was afraid of Harner. Cooney thinks Olivia might continue to be afraid of Harner, and his yelling and screaming, and she did not think that it would be in Olivia's best interest to be with him. Cooney said that, in addition to his screaming at Olivia, Harner screams at Deeter.

Considering her emotional needs, Thomas recommends that Olivia live primarily with Deeter during the school year, so she may continue in her school district, with the important friendships that she has, and so she may maintain her familiar systems and her ongoing contact with Cooney. Thomas believes that, as Olivia was a little over three years old when her parents separated, it is unlikely that she remembers her home and "family" as including Harner. Rather, Thomas opined, Olivia's recollection of Harner is her having contact with him every other weekend.

Thomas originally indicated that Olivia should spend the primary time in the summer - beginning three to seven days after the end of school and ending two weeks prior to the start of school - with Harner. The summer end point suggested by Thomas would allow Olivia to return to her environment and established routines, and, prepare for the academic

year. Thomas believed Olivia should visit with Deeter and Cooney every other weekend in the summer.

Thomas found the animosities and conflicts among the individuals much more severe than in most custody cases and that Olivia struggles with the situation, as she would like to make all of the people happy. As Olivia needs a more relaxed environment and more freedom to be herself, Thomas opined, the adults would contribute to that experience by ending the animosity and distress. However, if the distress remains significant, Thomas believed that the adults needed to access supportive counseling to address those feelings.

Thomas had not been aware of the letters that Bugdanavage had written to Olivia until presented with them during his testimony. Thomas found the letters to be "a major problem," and a cruel attempt to manipulate Olivia. Thomas wants to promote contact between Olivia and all people who love her, except anyone who is doing something overwhelmingly destructive. Thomas believes Olivia needs to feel comfortable and at ease in pursuing relationships with all people, but he does not recommend unsupervised contact between Olivia and Bugdanavage, as he finds the latter's conduct, including prayer focused on getting away from the "other side," extraordinarily destructive and indicating an unsound psychological process.

When doing his evaluation, Thomas was unaware of evidence that Harner had struck Karen, and, had been found guilty of doing so. Thomas found that Harner's lack of truthfulness, in not telling Thomas about the finding of guilt and the protection from

abuse action was troubling and such reinforced his concern regarding Harner's personality structure. Prior to trial, Thomas had also not been aware that Harner had engaged in angry exchanges with Paige, which Thomas found grossly inappropriate and which raised "a lot of concern" with him.

Thomas testified that one's personality structure is difficult to change and may rise to a diagnosis of mental dysfunction, but stated that he was not comfortable giving any diagnosis of Harner. As Thomas learned more information - established by other evidence at trial or offered via hypothetical questions - he opined that counseling and co-parenting for Harner may be necessary. Thomas further stated that although he would advocate for Olivia to have an increased relationship with Harner, he qualified such position by the condition that the relationship not be a destructive experience.

At the time of Thomas's evaluation, Olivia would not discuss her position on the custody schedule. However, Thomas stated that if Olivia says that she would like to go back to the "old schedule," he would consider her feelings as important and want to know her reasons.

Eric Harner. Harner is the natural father of Olivia. He was initially called as of cross in Deeter's case in chief, and later, he testified again in his own case. Harner's testimony and demeanor at trial exhibited evasiveness and a lack of credibility. The failure to be forthright was pervasive throughout Harner's testimony.

Harner is 42 years old, lives in Duncannon with his wife, Joy, and son, Jacob. Harner acknowledged in cross-examination that at the time of his separation from Karen, a protection from abuse order had been entered in favor of Karen, and, that he was also charged with harassment for striking her.

Harner acknowledged that Karen had undergone medical procedures every three months while he lived with her, following which she could not care for Olivia for several days at a time. He further was certain that throughout Deeter's marriage to Karen, Deeter had been taking care of Olivia daily during similar such periods, and, during the times Karen was sick.

Harner claimed that he was not sure if he had told Deeter that he intended to take Olivia from Tri-Valley School at the end of May, 2007, so that she would not complete the school term. Harner further claimed that he was not sure if he had said that he intended to home-school Olivia. Harner initially claimed that Pastor Dana did not contact him to check on Olivia. Rather, he said that Pastor Dana had asked for Olivia to call her. Harner felt that Pastor Dana was "biased" and claimed that he may have told Pastor Dana that it was "none of her business." Harner did not permit Olivia to call Pastor Dana.

Harner claimed that he knew Olivia's teachers, but, upon questioning, he was unable to state their names, and then, he claimed that he was not sure if he ever had contacted Olivia's first, second, third or fourth grade teachers. Although he went to the parent-teacher conference for Olivia in fifth grade, Harner could not name Olivia's teacher.

Harner claimed that he did not know the parents of Olivia's friends, with the exception of Paige's parents, with whom he does not have a good relationship. Harner acknowledged that during a period of time he had failed to pay child support for Olivia, for which failure he had been held in contempt. Harner also acknowledged that he knew that Deeter had been assisting Karen in paying child care expenses, and admitted that he has paid no support for Olivia since April 12, 2007.

Harner claimed that he previously had wanted Deeter to have no contact with Olivia, but that he is now supportive of an ongoing relationship between Deeter and Olivia. Harner claims that he realizes it is not in the best interest of Olivia to terminate her relationship with Deeter and that he thinks Olivia loves Deeter, and, that Deeter loves her. Harner's testimony referable to his belief about the importance of maintaining a relationship between Olivia and Deeter was not credible.[4] Harner claims that he "blames" Deeter but forgives him, and that he (Harner) had told Deeter that he (Deeter) could see Olivia whenever he had wanted. Harner, further, is not concerned about any impact upon Olivia from removing her from her dog, friends, school or surroundings in Higgins and claims that Olivia thinks she has two hometowns.

When he testified, Harner claimed that Bugdanavage - who testified prior to his doing so - should have no unsupervised contact with Olivia.

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[4] Notably, the proposed decree submitted post trial by Harner contains no provision for Deeter to have any contact with Olivia

Harner claimed that he did not know of Bugdanavage's correspondence to Olivia and that he did not know of her praying with Olivia. Although Harner stated that at one time he may have felt that Deeter's interest in Olivia had been abnormal or obsessive, Harner claimed that he now feels otherwise. Harner did not know when he had changed his position about Deeter, but claims he realized that Olivia can love whomever she wants. Although Harner claims that he does not respect Deeter as a parent in Olivia's life and that he disagrees with Deeter, he acknowledged that since February, 2005, Deeter has acted as a parent to Olivia. Harner claims that he cannot communicate with Deeter but says he is ready to do so.

Harner was not aware of the identity of Olivia's present physician or dentist and has not asked for any health information about Olivia. Although Harner claimed that the last doctor appointment he had attended for Olivia had been a couple years ago, he then said that he did not meet the doctor.

Harner did not have health insurance on Olivia at any time. Karen maintained insurance on Olivia and after her death, Harner claimed that he was not allowed to obtain insurance because of the custody proceeding. Harner testified that he had applied for insurance and was told that he could not get it for Olivia. Harner was not sure when he had allegedly applied for the insurance, had no corroboratory evidence to such effect, and later testified that his wife, Joy, had obtained a job to pay bills and to provide for health insurance. Harner then claimed that he will get insurance if his wife quits her job.

Harner has never asked Deeter if Olivia has had any uninsured medical costs, he has never offered to assist Deeter with uninsured costs, and, he has never asked anything about Olivia's eyeglasses, including why they were prescribed, or, their cost. Similarly, Harner did not provide, pay for, or contribute to the purchase of Olivia's clarinet. Harner has not paid for Olivia's school lunches and believes Deeter has paid all those expenses.

Harner claimed that he had a letter sent that indicated that Olivia did not desire to play softball. Harner claimed that Olivia had said that she would forego sports to have time with him, and, he claimed that he had not suggested to Olivia that she give up sports. Harner claims that Olivia has expressed a concern about "getting things done" on weekends and that to do so, she was willing to forego participating in basketball and softball. Strong proof of Olivia's desire to engage in sports, credibly confirmed by numerous witnesses, clearly contradicted Harner's testimony. Harner did not know the identity of Olivia's coaches and was not involved in fund-raising for her activities, except he remembered purchasing some things, claiming that he did not pay much attention.

Harner incredibly claimed that he had never confronted Deeter at the basketball game, as testified to by other witnesses, and claimed that Olivia had not been present at the time. Rather, he claimed that Deeter had threatened Harner, yelling, "I'll take you any time." Harner claims that when he tries to talk to Deeter, there's "no reciprocation," and, that he wants to change and talk as adults. Harner claims that Deeter had repeatedly made fun of Jesus, and has said "you are not going to have any rights." Upon further

questioning on these issues, Harner was evasive and then claimed that he tries to forget and he cannot remember the allegedly numerous troubling conversations with Deeter.

Harner claims that he originally had offered Deeter visitation with Olivia, provided Deeter and Cooney did not file for custody. Nevertheless, Harner vacillated on whether he had told Deeter to get out of Olivia's life, then acknowledged that he had told Deeter's mother, while at the courthouse to attend a proceeding, that she had raised a heathen, but, further claimed that he will foster a relationship between Olivia and Deeter.

Harner claimed that he never gave Deeter permission to exercise rights or make decisions referable to Olivia. He also claimed that he did not know how he had gotten in arrears for child support, while acknowledging that such had occurred. Although Harner further testified that he did not authorize Deeter to fill out school records for Olivia, he (Harner) never contacted Olivia's school in her fourth or fifth grades to provide information or complete any records about Olivia.

During his testimony, Harner was presented with a court order of November, 2003, entered in the custody case between Karen and Harner. The order directed that Harner continue with counseling until discharged. Specifically, the order provided "[Harner] will continue his counseling with Dr. Paul Anderson until discharged." (Child's Exhibit No. 4). Harner confusingly claimed that he had gone for one evaluation, was told to return, told the appointment was cancelled, told that Dr. Anderson had moved, and then, told that he (Harner) had no issues.

Similarly, a custody order of June, 2001, entered in the case between Karen and Harner, provided for Harner to seek personal counseling from a licensed psychologist or social worker and follow through with all recommendations. (Child's Exhibit No. 3). Although it appeared that Harner was to continue such 2001 ordered counseling, via the terms of the November 14, 2003 Court order, "until discharged," Harner purportedly had received no counseling. Harner claimed that, despite his entering into stipulations on two occasions to receive counseling, he did not know any reason why he was to receive counseling. As such provisions were contained within custody orders involving Olivia, and, apparently, related to an issue or issues impacting the custody and/or well-being of Olivia, Harner's feigned lack of knowledge and his lack of compliance are disconcerting, especially as no third person existed to provide information to the Court on the matter.

The facts that Harner claimed that he was to receive counseling in the Army, was twice ordered to receive counseling in the custody action with Karen, was subject to a protection from abuse order involving Karen and was found guilty of harassment by striking her, but has not received the court-ordered counseling, also concern the Court relative to custody of Olivia. Unfortunately, in making complete findings on relevant issues, the Court is limited due to Harner's lack of credibility, the inability to ask Karen questions, and the lack of knowledge of third parties about what had transpired between Karen and Harner. Karen had alleged in her protection from abuse petition, inter alia, that Harner had threatened her and had caused problems at Olivia's day-care, the staff of which had informed Karen that Harner had scared the staff, who

did not want him scaring the children. (Child's Exhibit #9). The final protection order directed Harner to specifically stay away from the day-care center. (Child's Exhibit #10). Whether Karen's allegations regarding Harner's conduct were accurate are unknown and findings cannot, and are not, being made relative thereto.

Harner's wife currently works full-time, which information had not been known to Dr. Thomas at the time of his issuance of his report. Harner, assuming he obtained primary custody of Olivia, has not arranged, or, evaluated possible provisions for child care for Olivia in the summer. However, Harner indicated that his son is in day-care daily from 8:00 a.m. to 5:00 p.m., and, although he is not sure of the ages of the children in the day-care, Harner stated that he may place Olivia there also. During the last day of trial, Harner then claimed that his wife was pregnant and may discontinue working for some period at some time in the future and be available to care for Olivia.

Harner claims that Olivia's relationship with Cooney is important and that he believes that Olivia should have frequent contact with Cooney. However, he stated that he did not know how often such contact should occur. Harner also claimed that prior to Karen's death, he had been exercising custody of Olivia three weekends of the month, as he and Karen had agreed to such a schedule. Such claim was contrary to the reliable testimony of other witnesses, including Deeter, Cooney and Olivia.

Harner has been living in Duncannon, about forty minutes from Deeter's home, since mid-2007. He previously had lived at a home of Bugdanavage, after

he had left a home in Muir that had been owned by his wife, due to a foreclosure action. Harner's residential moves have created the existence of greater physical distance between his home and Olivia. Harner claims that his most recent move was also due to a need to be close to his employment to which his commute takes about twenty minutes. Nevertheless, Harner further testified that he had offered to move to the Hegins area in an attempt to resolve this case. The reason Harner actually chose to live in Duncannon cannot be determined by the evidence presented. Harner claimed that he had proposed moving to Hegins when he had met with the other parties and their counsel in the courthouse, apparently, at the time of a proceeding. Harner claimed that when he made the offer, he had been on his hands and knees crying and "everyone" had laughed at him. He later claimed that only Deeter had laughed, but that all of the rest were "disgusted." (Although the parties in this case may understandably be somewhat emotional, to the extent that Harner had been crying on his knees - in light of the other evidence bearing on his personality and emotions - appears to lend support to some of Dr. Thomas' concerns.)

In response to a question about the request made to him by Olivia to go camping with Paige on Labor Day 2008, Harner claimed that when Olivia had called him, asking to go camping, he told her that she could not go on the trip, as she had not asked him "in time" and he had things planned. However, Harner was not sure what plans he had made for the weekend. Harner also claimed that, in response to Olivia's request, he did not call the Doyles, that he did not yell at anyone about Olivia's request, that he never raised his voice at Paige, and, that he did not remember talking to Paige.

Paige's reliable testimony, detailed hereafter, contradicts Harner's testimony.

One of the specific issues dealt with in November, 2008 by the Court while the parties were present in the courtroom was the requirement that the parties assure that Olivia is transported to her activities, in particular, as she had just begun basketball, in which, contrary to Harner's testimony, Olivia had wanted to participate. Olivia, in fact, through her counsel, had urged that the Court address the matter. After the court proceeding and at the first opportunity to comply with the Court's direction, Harner failed to do so. Harner's testimony on the matter, claiming that he thought that all had agreed to Olivia's missing the event, was not reliable and had been the subject of a contempt hearing, following which Harner had been found in contempt.

Harner offered testimony which established that he, Olivia, his wife and son have engaged in various activities when Olivia is in his custody. In addition, Olivia has certain responsibilities at Harner's home - such as keeping her room neat. Harner's wife, apparently, primarily addresses discipline issues, and handles all transportation for returning Olivia to Deeter's custody and any meaningful communication with Deeter.

Lori Bond. Lori Bond has known Harner all her life and she sees Olivia on Sundays. Bond observed Olivia to appear very sad after Karen's death, but finds that, more recently, Olivia appears happier. Per Bond, Harner has quite a noticeable temper and gets loud; however, she has not seen him discipline Olivia. During her testimony, Bond - who had been called as

a witness for Harner - seemed uncomfortable and became teary when acknowledging Harner's temper.

Ruth Williams. Ruth Williams testified that she and her husband, Richard Williams, a pastor, are very good friends with Harner, whom they met in church. Williams finds Olivia to have very good manners and that she is polite, sociable and friendly. Harner had attended Calvary Independent Church where Bond's husband had been an assistant pastor. She believes Harner now goes to a church in Camp Hill.

Joy Harner. Joy Harner (Joy) married Harner in July, 2004. She resided with him in Williamstown until January 2002, then lived in a home in Muir until October, 2004 and then moved to Jonestown with her mother, Bugdanavage, until June 2007, when they moved to Duncannon. Similar to the testimony of Harner and Bugdanavage, the evidence presented by Harner's wife often was not credible or, otherwise, was deceptive.

Joy claimed that she did not know of Bugdanavage's letters to Olivia, that they had not prayed about custody and that she had never seen Bugdanavage's letter to Children and Youth. Joy claimed that, despite having traveled to trial together, her mother did not talk to her about the custody case after Bugdanavage had testified and that she was not aware that her mother had a file about the case. Further, Joy claimed that her mother never had said anything to her regarding her allegedly having concerns that Deeter was a sexual predator. Joy then further claimed that Bugdanavage, with whom she had resided until June, 2007, and had visited regularly, is not a positive influence for Olivia.

Prior to Karen's death, Joy handled the communication about Olivia with Karen by talking at exchange points, as it was better if she did so, rather than Harner. Joy testified to alleged negativity exhibited by Cooney at a custody exchange in Lavelle. Joy also claimed that she does not say disparaging remarks about the other parties, except that she has stated that she wishes "this" would get "over with" and move forward.

Joy is a full-time officer manager at a job in Hershey, working 8:30 a.m. to 5:00 p.m., Monday through Friday. She also works several hours on weekends about every other month. She claims that if Harner had custody of Olivia, she could change her work schedule so she would be able to put Olivia on the bus.

Joy claimed that Olivia often indicates that she wants to live with Harner and that Olivia has left notes in their house to such effect. (The authenticity and/or reliability of such notes was convincingly disputed by Olivia's testimony.) She further testified that Olivia has never said that she wanted to attend the Hegins school. Joy, as did Harner, described numerous activities in which they have engaged with Olivia and Jacob. The activities appeared wholesome and appropriate, as did Olivia's attendance at Camp Dragonfly. Further, the evidence established that Olivia generally enjoyed a good relationship with Joy.

Joy claims that Harner had attended Olivia's sporting events only "on their time," as they are not always aware when Olivia's games are scheduled, and, that it was difficult to arrange schedules. Further, because they don't want to "add pressure," Joy said

that they only go to games when invited, or, if Olivia is in their care. Joy later testified that they had received sports schedules in the past. Joy claimed that Olivia did not attend a basketball tournament last year because of a conflict in plans and had never been told by anyone, including Olivia, about the 2008 Halloween party which Olivia had helped plan.

Joy testified that at one time she thought that Olivia was in too many activities, as it was difficult to "maintain a connection" with her. Further, she claimed that Olivia did not want to play basketball this year, as Olivia had wanted to do "family things," and that last year Olivia had cried that she did not want to play basketball. This testimony clearly did not reliably relate Olivia's desires.

The first Sunday in December, 2008, Olivia was to attend a basketball scrimmage. Deeter informed Joy of the scrimmage and she claimed that she told Deeter that Olivia was going to church that day because Olivia was practicing in a Christmas program. Joy then claimed that Olivia was to sing in a group and had no specific part in a church program. Joy also claimed that she had talked to Olivia about the matter and that Olivia had wanted to get a Christmas tree after church, rather than go to the scrimmage. The evidence clearly established that Olivia had wanted to attend her scrimmage. The Court is not reviewing the evidence about the events in detail as such was the subject of a contempt hearing at which the hearing officer concluded, inter alia, that Harner and his wife had not been credible. The relative importance of the child's attending the scrimmage or an allegedly conflicting (time-wise) church service, is not the pertinent point of this discussion. Rather, the relevant

observation is that during the proceedings in Court and at the contempt hearing, Harner and his wife consistently testified falsely, or with an intent to mislead when discussing their motives and actions and those of others, including Olivia.

Joy acknowledged that Olivia was not allowed to go on the camping trip with Paige on Labor Day, 2008, as she felt that Olivia should not call "at the last minute" with requests. Moreover, Joy believes that Olivia saw Paige often enough. Although Joy claimed that she originally thought that cutting off contact between Olivia and Deeter was good, she now claims that she thinks that Deeter is important to Olivia. Joy testified that she does not talk to Olivia about Deeter because of stress, and, that she only talks to Olivia about Cooney if Olivia initiates the subject. She (Joy) rarely talks to Cooney.

Kurtz Cockley. Kurtz Cockley is a marriage and family therapist who met with Harner and Olivia upon request by Harner. Cockley found Olivia to be intelligent, mature and thoughtful. Olivia talked about Deeter and Charlie in Cockley's first session. Cockley saw no signs of impairment of daily functioning in Olivia, but he did not get far into counseling and could not testify whether Olivia needed counseling. The counseling had not been arranged via consent of the other parties or the knowledge of their counsel and Deeter and Cooney had not been invited to attend. Apparently, due to various concerns, including that the counseling may have been sought in an effort to undermine Olivia's relationship with the other parties, it had been terminated.

Sandra Cooney. Cooney, a widow who had five children, is Karen's mother. Cooney had been very close to Karen and, while Karen was living with Harner, Cooney provided care for Olivia when Karen was ill. After Karen left Harner, Karen lived with Cooney for a short time and then moved to a home about five blocks from Cooney. During the time that Karen lived at her new home, Cooney saw Olivia every day and had Olivia overnights from one to three times a week. Cooney lives about fifteen minutes from Deeter. When Deeter worked in Dubois, Olivia spent several Sunday nights with Cooney, who drove Olivia to school the next day.

Cooney attends Olivia's activities, unless she is working at her part-time job (usually two days a week from 6:00 a.m. to 2:00 p.m.). Cooney maintains a very good relationship with Deeter, communicates well with him, and, can adjust schedules with Deeter to see Olivia when she is with Deeter. Cooney has a good relationship with Deeter's parents and talks to his mother about Olivia if Deeter is at work.

Cooney does not have a good relationship with Harner. When attempting to contact Harner by phone, she generally receives a voice mail and Harner does not call her. Cooney does not believe she would be welcome at Harner's house.

Cooney has an extended family in Schuylkill County with whom Olivia maintains contact, via Cooney taking her to visit on holidays, birthdays and family reunions. Cooney attended her family reunion each year with Olivia except in 2008 when Harner would not accommodate a change in the custody schedule. Cooney finds that Harner is not easy to talk

to or accommodating. After Karen died, Harner told Cooney that she could see Olivia upon request, but then, he reneged on the offer.

Cooney notices that when Olivia is with Harner, she appears more quiet and withdrawn than is typical for her. Olivia usually looks to Harner before talking, doesn't "volunteer anything," and appears afraid to speak without permission. When Olivia is with Deeter, Cooney observes her to be bubbly and happy. Olivia, further, does not look to Deeter before talking.

Cooney has a strong relationship with Olivia. Cooney has kept Karen's things, such as prom and wedding gowns, batons and dolls which she shares with Olivia. Cooney has been able to comfort Olivia when she is sad.

The holiday traditions with Olivia since her birth had involved Olivia spending Christmas Eve to morning with Karen, and then part of Christmas Day at Cooney's house with all of Cooney's children and grandchildren. On Thanksgiving, Cooney's family, including Olivia, generally, came to her house about noon. The first Thanksgiving that Olivia had been with Harner, Cooney called Olivia but was unable to speak to her. Cooney's family, including Olivia, typically visit with Cooney the Saturday of Labor Day weekend, which is the day of the ABA parade in Ashland. Karen had participated in the parade and Olivia enjoys attending the event. Deeter has also become part of the Cooney family traditions.

Cooney would like to see Olivia live with Deeter, as she believes Olivia would be happier in Deeter's home than if she lived with Harner. Further, Olivia is

established in the Hegins community where she has many friends, and, Cooney can see Olivia anytime she desires. Cooney has considered Deeter as being Olivia's father, found him responsible and has seen him comfort Olivia. Cooney would like her family holiday traditions to continue and to exercise at least one week of custody of Olivia in the summer.

According to Cooney, Harner's partial custody schedule had never been changed to three weekends a month as he had claimed. Cooney also did not believe that Harner should exercise custody every weekend, as Olivia could not engage in many of her activities and had not engaged in cheerleading, as the games had been on Sundays. Further, Harner has not been flexible in accommodating desired schedule changes for any weekend events. (As noted, the every weekend schedule for Harner that had been set, following a custody officer's hearing on August 31, 2007, was changed by the Court by order of February 4, 2009).

Cooney credibly testified about Harner's outburst at Deeter at a basketball game, Harner's accusation that she had caused the split between Harner and Karen, Harner's calling Cooney the "bitch up north," and, Harner's hollering at Cooney at a custody exchange. Cooney believes that Harner never treated Karen properly after their separation and that every time he had the opportunity, he would scream, curse Karen and call her names. Cooney also believed that Olivia was afraid of Harner.

Cooney presented as a very caring, concerned grandmother, with her entire focus being on Olivia's well-being. Nothing indicated that Cooney would do anything to harm Olivia - such as destroy Karen's

things, as mentioned in Bugdanavage's testimony - or that Cooney would misrepresent to the Court any conduct of Deeter or Harner which she had witnessed. Rather, Cooney was particularly impressive, as was Deeter, in exhibiting and possessing a strong interest in seeing that the best is done for Olivia.

Janette Deeter. Janette Deeter, Deeter's mother - whom Olivia calls "mom mom" - lives next door to Deeter and considers Olivia her grandchild. Mrs. Deeter babysits Olivia and three of her seventeen grandchildren before school and, generally, has Olivia after school. Mrs. Deeter had done so since Olivia had been in first grade. Mrs. Deeter helps provide transportation for Olivia's activities, or to take her to Paige's home, and, she also babysits Olivia in the summer when Paige often comes to her home to swim. Seven of Mrs. Deeter's children, and all but one grandchild, live within twenty minutes of her home.

Mrs. Deeter saw Olivia after Olivia had requested Harner to allow her to go with Paige on the Labor Day camping trip. Olivia was crying, claimed that she knew she was going to be in trouble and would be hollered at for two hours. Mrs. Deeter confirmed that Harner's partial custody schedule had been alternating weekends.

Harner had indicated, when he originally retrieved Olivia from Deeter after Karen's death, that the Deeters could maintain contact with Olivia by contacting him. When Mrs. Deeter called Harner, however, he told her that she was calling on his work phone and directed her not to call during the day. Mrs. Deeter later called Harner's home but received no answer.

Mrs. Deeter supports her son's request for custody of Olivia.

Amy Doyle. Amy Doyle is the mother of Paige, Olivia's best friend. Paige had spent time, including having sleep-overs and doing other activities, with Olivia on weekends when Karen was alive. After the weekend schedule of custody changed, Paige did not see Olivia on weekends, so they had sleepovers during the week. Paige and Olivia spend almost every day together in the summer, dividing the time between the Deeter and Doyle homes. The Doyles have also taken Olivia on family trips and camping.

Mrs. Doyle had not talked to Harner before Karen died, but, she received many calls from Harner after Karen's death in which he complained about Deeter. Mrs. Doyle also received many angry messages from Harner which he left on her answering machine. Mrs. Doyle stopped taking Harner's calls after an incident when Paige, then nine years old, had been at Harner's house and upon returning, reported that she did not want to go to his home again. While at Harner's house, Paige reported that she had been told to join in a prayer for Olivia to stay with Harner and not to be with Deeter. When she appeared reluctant to do so, Paige said that she was told that she was selfish for not doing so. Paige reported, further, that derogatory remarks were made to Paige about Lutherans by Harner's wife. Mrs. Doyle will no longer send Paige to Harner's house. Mrs. Doyle had also witnessed Harner approach and scream at Deeter at a basketball game.

On Labor Day weekend of 2008, Paige asked Olivia to go camping with her family. Paige reported to Mrs. Doyle that Olivia might be able to go to camping with

the Doyles, but that Olivia had to check with Harner. Paige, then ten years old, become upset upon receiving a call from Harner. Paige reported that Harner was yelling and screaming at her about how dare she try to take his child on "his time."

Mrs. Doyle communicates with Deeter well, they talk about the children's activities and share transportation. Deeter's family members - Robin and Scott - also help with transportation for band, practices and sports. Sometimes, Mrs. Doyle talks to Mrs. Deeter about the children's scheduling.

Mrs. Doyle is close to Olivia, whom she calls "daughter #2." Mrs. Doyle has talked to Olivia about Karen's death, after which Olivia wanted to be with Paige "all the time." Olivia has expressed a desire to Mrs. Doyle that she wanted her schedule to be as it had been, which Mrs. Doyle knew to be visiting Harner on alternating weekends.

Paige Doyle. Paige Doyle, Olivia's best friend, is eleven years old, in fifth grade and does well in school. She has known Olivia since first grade and they engage in many activities, including basketball, softball, going to the movies or the mall, riding four-wheelers, sleigh riding and, at the time of trial, they were building a fort.

Olivia often sleeps at Paige's home one time a week and Paige sleeps at Deeter's home one time a week - usually on Thursday night, as Deeter does not work on Friday. Paige spends time with Olivia's "mom-mom," River, Ruby and Luke, and pretends to be their teacher in Olivia's play school room.

Paige had visited Olivia at Harner's home but stopped doing so after she was told that she was selfish if she did not join in a prayer for Olivia to remain with Harner. While at the Harner home, Joy showed a computer site to Paige and Olivia that referenced something about a protest for Olivia to stay with Harner and a plea to "help us keep our daughter."

Paige was also in a car with Harner and Olivia when Harner was talking on a cell phone about Olivia staying with him, while the conversation was being broadcast on a radio show. While at Harner's home, Joy told Olivia and Paige, who is Lutheran, that Lutherans are "stupid," after which Paige felt "bad." (Pastor Dana also preaches in a Lutheran church.)[5]

Paige felt scared when she received Harner's call about the Labor Day camping trip. He yelled at her, claiming that Olivia was his daughter and the camping trip was a waste of his time. Paige cried and felt scared. In fact, Paige almost began crying in the courtroom when recollecting the incident. Olivia has told Paige that she wants to live with Deeter and to see Harner sometimes.

Olivia. Olivia is eleven years old. She has been engaged in the quiz bowl, plays the clarinet in the band, plays softball and basketball. She testified in camera after Paige had testified. Olivia had asked Paige to testify for her in court.

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[5] While Paige had been with the Harners, other religious remarks were made to her, including that to go to heaven, a person must wait until Easter for Jesus to shed his blood on them. To the extent the comment had been made in reference to Karen's death, such is not known.

Olivia says she lives with "Kent and Kylene" and has a bulldog "Charlie." Olivia plays school with River and Ruby and sees "mom mom" almost every day. Olivia would like to remain living in Hegins with Deeter and see Harner every other weekend. Olivia desires the every other weekend schedule as the every weekend schedule prevented her from being with friends and her basketball games are always on weekends. Olivia also desires to follow her past tradition on Christmas - waking up in Deeter's home and visiting her "cousins," friends and Cooney. Olivia testified that she desires to live primarily with Deeter "[b]ecause like my family lives close to there" - referring to Cooney's and Deeter's extended families. Olivia also wants to live with Deeter because "all [her] friends" are there, and, she said, "Charlie is there, and that's where my mom always lived." Olivia finds it important to live where her mom had lived.

Olivia testified that when she had asked Harner about the Labor Day camping trip, he "sounded mad," and said "it's my time." On another occasion, Harner directed her never to ask to go to a dance, as such was "his time." Olivia testified that Harner had a temper, which she thinks has started to get better "not too long ago." Olivia discussed engaging in various activities at the home of Harner, including playing board games, sleigh riding and swimming at a nearby pool.

Olivia confirmed that she had been required, while with Harner and his wife, to pray to stay at Harner's home and that Paige had been told that she was selfish for not doing so. Olivia testified that she also did not want to pray for what she had been directed to do. Olivia believes she is a Lutheran and desires to go to Pastor Dana's church. She likes the small school at

Tri-Valley and the church of Pastor Dana, as opposed to the large school and church which she would attend if living with Harner. Olivia believes that it is important for her to go to Pastor Dana's church, because, she said, "that's where my mom got married and it reminded me of happy thoughts." Olivia wants to go to Pastor Dana's church with Deeter, who she knows would take her if she asked. Olivia knew she could ask Deeter directly and would not need her attorney to ask him to do so, as Deeter has taken her to church previously. Olivia likes Pastor Dana and talked to her one time because something was bothering her.

Olivia "really like[s] to go" and believes it important for her to visit Karen's grave, where she visits with Deeter or Kylene. Olivia would like to visit the site at least one time a week and feels comforted by going there. Olivia has also gone to the site on four-wheelers with River and Ruby. Olivia wears Karen's sweatshirts to sleep and her shoes to play school, as doing so makes Olivia "feel good."

Olivia does not have friends in Duncannon. She considers her dog Charlie "like [her] best friend," and considers her family to include Cooney, Deeter - whom she considers as a dad - Deeter's family, including River and Ruby, and Charlie, her dog. Olivia looks at Kylene as a sister to her, rather than simply as a friend. Olivia testified that she considers "mom mom like my grandma." Olivia is to be a junior bridesmaid in Deanna's wedding in May, 2009, and she desires to be in the wedding as she also considers Deanna as her sister.

Olivia still gets sad sometimes about her mother. If she is in school when that happens, Olivia goes to and talks with Mrs. Header because, according to Olivia, "she was my mom's best friend and stuff." When she talks to Mrs. Header, Olivia and Mrs. Header remember stories and laugh. If Olivia becomes sad at home, she talks with Kylene or Deeter. Olivia has also talked to Pastor Dana and Mrs. Doyle when things have bothered her, but she would not talk to Harner or his wife about her concerns. After talking to Pastor Dana, Mrs. Header, Deeter or Kylene, Olivia has felt comforted. Olivia did not feel comfortable talking to Kurtz Cockley and does not feel that she needs to talk to anyone on a consistent basis.

If Olivia receives invitations, she would feel comfortable asking or talking to Deeter or her attorney, rather than to Harner, as she is afraid Harner will say "no," and, be "upset" with her. In fact, Olivia told the Court the day of her testimony that she had received an invitation to a birthday party and had talked to Deeter and her attorney about it. Olivia had not talked to Harner about the invitation and desired that the invitation be addressed via the Court or her attorney. It was quite evident that Olivia feels uncomfortable talking about matters with Harner, including her feelings about Karen. Moreover, Olivia is afraid to ask Harner for permission to engage in activities with her friends, likely because of his past reactions, and, as Olivia has found Harner to have a temper.

Olivia testified that she feels comfortable talking to or hugging Cooney if she (Olivia) is with Deeter, but when asked if she felt the same way when she was with Harner, Olivia was equivocal and then replied,

"Yeah, but a little bit, not really." When asked if she knew why she felt that way, Olivia replied, "I don't know," indicating that Harner and Cooney do not usually talk, and that she feels a little uncomfortable when Cooney and Harner are in the same area.

During Olivia's testimony, she became visibly uncomfortable when Harner's counsel engaged in leading questions in an apparent effort to have Olivia agree that she would acclimate at Harner's home. Olivia - at that point in her testimony - asked the Court for a break so she could talk to her attorney. Olivia also appeared quite perplexed when shown exhibits which Harner's wife had identified as notes written by Olivia expressing a desire to live with Harner. The testimony and demeanor of Olivia indicated that Olivia never wrote such notes, nor possessed the desire as expressed in the notes, further, casting doubt on the testimony of Joy Harner on matters which were not independently established. When shown photographs of the notes - the originals of which were not produced at trial - Olivia looked perplexed at the writings purportedly authored by her, and shook her head negatively.

DISCUSSION

The Court has closely examined the evidence and post-trial filings of the parties in this case which presents the rather unique circumstance of a step-parent seeking primary custody of a child. Before evaluating the evidence in light of the applicable legal principals, however, several matters are worthy of special mention.

First, of significant note, the testimony offered by Harner, his wife and his mother-in-law was rather troubling due to the lack of credibility exhibited by each, their frequent failures to directly answer questions posed to them, and, their obvious attempts to obfuscate. Similarly, Harner had apparently conducted himself in a problematic manner when being evaluated by Dr. Thomas for the custody evaluations, thereby resulting in the psychologist being hindered in his analysis.

Harner and his wife claimed that they had not known of the activities and/or conversations between Harner's mother-in-law and Olivia relative to custody issues, despite their regular visits with her, and, their obvious close relationship - having lived in her house prior to moving to their current home. Further, they claimed such ignorance, despite their traveling to court with Bugdanavage for trial, at which she had indicated a need to refer to a file she had brought to the courthouse to aid in her testimony. Although Harner claimed, after Bugdanavage had testified, that he had not known of her letters to Olivia, and, that he would prevent Bugdanavage from having unsupervised contact with Olivia, the lack of credibility exhibited throughout his testimony renders the latter assurance of some doubt, particularly if he were awarded primary custody.

Similarly, the Court finds Harner's testimony lacking in reliability in generally all respects, except upon those matters supported by independent evidence. Only through extensive questioning were many issues either brought to light or clarified. Some matters, however, remain unclear. It is evident that Harner had been charged for and found guilty of

striking Karen, although he was reluctant to acknowledge the incident, claiming a lack of recollection. In addition, a protection from abuse petition had been filed and a final order entered, via consent, in favor of Karen against Harner. However, as Karen was not available to testify in Court, the extent of Harner's actions, relative to Karen's need for protection, could not be determined.

Notably, Harner had been required by the custody order dated June 28, 2001 to obtain counseling from a licensed psychologist or social worker and to follow through with all recommendations suggested by the counselor. Further, pursuant to the custody order dated November 14, 2003, Harner had been required to "continue his counseling with Dr. Paul Anderson until discharged." Because the Court could not hear from Karen as to the reason the counseling provisions were contained within the custody orders, and, as Harner was not forthright on the issue at all, the Court does not know why Harner had been so ordered, and, most importantly, why he had been subject to the requirement that he continue the counseling "until discharged." Whether the intent of the counseling requirement was to address abuse, anger, or some other issue is not known. Although Karen had alleged in her custody complaint that Harner could not care for Olivia due to, inter alia, his emotional state, his abusive and threatening language, his conduct in Olivia's presence which had caused her to cry and become afraid of him, and his needing counseling, (Child's Exhibit No. 6), the Court cannot make findings on the allegations made by Karen due to the lack of proof. Nevertheless, per Harner, he obviously did not comply with and follow the orders regarding counseling in the custody case, and his claim of

ignorance as to the reason he had agreed - and been ordered - to attend counseling "until discharged," is not worthy of belief.

The testimony of Harner, his wife and mother-in-law included frequent references to religion in their lives. Generally, the role of religion in a child's development, as imported by a parent, is both a relevant consideration in a custody action and seen as a positive aspect in a child's development. The reliability of the testimony of Harner and his wife and mother-in-law on this issue, however, is in question. What is evident is that Olivia had been directed to pray about the custody case, she had been told that Lutherans are stupid and she had been told that her life was somehow comparable to the lives of Biblical figures, including the child threatened to be divided in half by Solomon. The extent of discussions about comparisons of Olivia to the Biblical recounting of the trials of Job and with regard to her need for angels, such as those with Daniel in the lions' den, due to the custody case and Deeter's professed love for Olivia - as Bugdanavage referenced in her talks with and/or letters to Olivia - is unknown. Further, the one pastoral figure whom Olivia spoke of positively - Pastor Dana - is the one with whom Harner refused to allow Olivia to talk and who Harner said he believed was "biased." Nothing, however, indicated that Harner had ever met Pastor Dana or that he had any rational reason to possess a dislike toward or to distrust the only pastor his daughter has mentioned as being a comforting figure to her.

Harner has claimed that he did not consent to Deeter's provision of care to and exercise of parental duties over Olivia. However, Harner was very aware of

Karen's condition, as she had become sick shortly after Olivia had been born. Harner knew that Deeter was providing care for Olivia during Karen's life, and, he knew that Deeter was supporting Olivia financially, especially as Harner had been incarcerated on one occasion for non-support. Upon questioning, Harner claimed that he did not know whether his child support arrears had been $2,000.00 at some point in time. One would certainly expect knowing the circumstances surrounding a failure to support one's child, especially when complaining about having been imprisoned for contempt of a support order. Nevertheless, the extent of Harner's failure to pay and the period of time he had been in arrears are not known. However, it is known that Harner failed to consistently fulfill his parental responsibility to support Olivia, that Deeter undertook such responsibility, and, that Harner has not paid any support, nor provided financially for Olivia, since April 12, 2007 - starting six weeks before Karen died, and continuing to the end of trial, a nearly two year period.[6]

While Karen and Olivia lived with Deeter, and following Karen's death, Deeter consistently attended to Olivia's school affairs, and met with her teachers. In addition to providing for her financially, Deeter has covered Olivia with health insurance and has seen that she obtained medical, dental and eye care. It is evident that Harner did not actively engage in Olivia's academic progress and affairs. Since Karen's death, he

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[6] It is assumed that Harner had a small credit balance as of April 12, 2007 based on the information Harner provided as to his payment history which, however, was not particularly clear.

further has not paid for Olivia's school-related expenses, he has not provided for her clothes, he has, apparently, never provided health insurance coverage for Olivia and he has not contributed toward her uncovered medical expenses. In addition, Harner has not seen that Olivia obtain care for her teeth or eyes, or met with any doctor, at least for a significant period of time. Deeter, rather than Harner, purchased Olivia's eye glasses and her clarinet so that she could see clearly and play in the band.

Although Harner's claim that he did not expressly consent to Deeter's provision of care and exercise of parental duties appears to be the case, he certainly did not protest, but, rather, tacitly consented to Deeter's performing parental duties prior to Karen's death. In particular, Harner clearly offered no contest when Deeter provided for Olivia financially, or handled her academic and medical issues, or her extra-curricular activities.

There is no question that a parent has a fundamental right to make decisions about the care, custody and control of his child and that the law provides that the determination about a child made by a fit parent must be given material weight when at issue before a court. This case has been particularly troubling to the Court as the fundamental right of a parent over a child should not be infringed upon in any respect, unless compelling circumstances dictate otherwise.

Initially, it must be determined whether Deeter and Cooney have standing so to accord their requests for relief any legal consideration. Based upon the pleadings, evidence and written post-trial filings of the

parties, it appears that Harner is not contesting the standing of Cooney. In fact, his proposed custody order includes provisions for a partial physical custody award to Cooney. Consequently, the Court is led to understand that Harner is conceding that Cooney's exercise of partial custody of Olivia would be in the child's best interest and will not interfere with the parent-child relationship. (23 Pa.C.S. 5311). Nevertheless, despite this assumption, the Court – upon independently determining the issue of standing relative to Cooney – finds that she has standing to pursue relief.

In this regard, Pennsylvania statutory law provides for grandparents in the position of Cooney as follows:

> If a parent of an unmarried child is deceased, the parents or grandparents of the deceased parent may be granted reasonable partial custody or visitation rights, or both, to the unmarried child by the court upon a finding that partial custody or visitation rights, or both, would be in the best interest of the child and would not interfere with the parent-child relationship. The court shall consider the amount of personal contact between the parents or grandparents of the deceased parent and the child prior to the application.[1]
>
> 23 Pa.C.S. 5311

[1] As detailed hereafter, exercise of partial custody by Cooney would be in Olivia's best interest and will not interfere with the parent-child relationship.

Pennsylvania law also provides that a person who stands in loco parentis to a child may obtain standing in a custody action, provided the original attempt to obtain such status was not in defiance of the wishes of the parents and the parent/child relationship. See, *Karner v. McMahon*, 640 A.2d 926 (Pa. Super. 1994). The Pennsylvania Supreme Court has described the status as follows:

> The phrase 'in loco parentis' refers to a person who puts himself in the situation of a lawful parent by assuming obligations incident to the parental relationship without going through the formality of a legal adoption.
>
> *Commonwealth ex rel. Morgan v. Smith*, 241 A.2d 531, 533 (Pa. Super. 1968).

In addition, the Pennsylvania Superior Court has stated:

> This status, (known as 'in loco parentis') embodies two ideas; first, the assumption of a parental status, and second, the discharge of parental duties. . . .The rights and liabilities arising out of that relation are, as the words imply, exactly the same as between parent and child.
>
> *Spells v. Spells*, 378 A.2d 879, 881-882 (Pa. Super. 1977) (citations omitted).

Further,

> The in loco parentis basis for standing recognizes that the need to guard the family

> from intrusions by third parties and to protect the rights of the natural parent must be tempered by the paramount need to protect the child's best interest. Thus, while it is presumed that a child's best interest is served by maintaining the family's privacy and autonomy, that presumption must give way where the child has established strong psychological bonds with a person who, although not a biological parent, has lived with the child and provided care, nurture, and affection, assuming in the child's eye a stature like that of a parent. Where such a relationship is shown, our courts recognize that the child's best interest requires that the third party be granted standing so as to have the opportunity to litigate fully the issue of whether that relationship should be maintained even over a natural parent's objections.[8]
>
> *J.A.L. v. E.P.H.*, 682A.2d 1314, 1319-1320 (Pa. Super. 1996).

Deeter has asserted that he has standing in this case based on his in loco parentis status. The evidence supports such a finding. In this regard, although evidence of Deeter's conduct which post-dated the initiation of the custody action has been cited

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[8] The Court also finds a comment by United States Supreme Court Justice Stevens in his dissent in *Troxel v. Granville*, 530 U.S. 57 (2000) worthy of note. Justice Stevens observed, "Cases like this do not present a bipolar struggle between the parents and the State over who has final authority to determine what is in a child's best interests. There is at a minimum a third individual, whose interests are implicated in every case. . .-the child."

previously and merits discussion in examining his actions and character, such has not impacted the Court's finding on standing which has been based on an evaluation of the activity by Deeter toward Olivia which pre-dated the custody action. Those actions by Deeter clearly meet the requirements delineated in the aforementioned cases.

Despite the standing determinations, both Deeter and Cooney, as third parties, bear a heavy burden to establish a claim to custody which is contrary to the position urged by the natural parent. In this regard, the Court has considered the legal presumption that a fit parent acts in a child's best interest. Further, the Court has examined the evidence to determine the likelihood that Harner, if granted primary custody, would allow Deeter and/or Cooney to have contact with Olivia, and the amount of such contact which he would allow in the absence of a court order. In addition, the Court has evaluated whether any custodial time granted to Deeter or Cooney would interfere with Olivia's relationship with Harner. In this regard, while recognizing that the right of a parent, Harner herein, to make decisions about the care, custody and control of their child is fundamental, it cannot be ignored that an important interest likewise is posited with the Court, Deeter, Cooney and Olivia to assure that the health and emotional welfare of Olivia are protected, in particular, such as here, where actions by her parent pose harm or a significant, real threat of harm to her.

In *Hiller v. Fausey*, 904 A.2d 875 (Pa. 2006), the Pennsylvania Supreme Court described the burden of proof standard to be applied in a custody action between a third party and a parent, which standard

was developed by the Superior Court and is applicable in this case:

> When the judge is hearing a dispute between the parents, or a parent, and a third party, ... [t]he question still is, what is in the child's best interest? However, the parties do not start out even; the parents have a "prima facie right to custody," which will be forfeited only if "convincing reasons" appear that the child's best interest will be served by an award to the third party. Thus, even before the proceedings start, the evidentiary scale is tipped, and tipped hard, to the parents' side. What the judge must do, therefore, is first, hear all evidence relevant to the child's best interest, and then, decide whether the evidence on behalf of the third party is weighty enough to bring the scale up to even, and down on the third party's side.

Id. at 887 (citation and quotes omitted).

In determining the best interests of Olivia, and according Harner the evidentiary presumption "that meaningfully tips the balance in the parent's favor," (Id. at 888), the Court has examined the relevant evidence to determine the custodial provisions which will serve and advance her physical, emotional, spiritual, intellectual and moral well-being. See, *Campbell v. Campbell*, 672 A.2d 835 (Pa. Super. 1996). In this regard,

> Case law is clear that the guiding star for the court in coming to a conclusion (in a child custody case) is the welfare of the child. To this

> the rights of parents and all other considerations are subordinate.
>
> *Spells v. Spells*, supra. at 882 (citations and quotes omitted).

Notably, Pennsylvania's custody statute further provides that:

> (1) In making an order for custody or partial custody, the court shall consider the preference of the child as well as any other factor which legitimately impacts the child's physical, intellectual and emotional well-being.
>
> (2) In making an order for custody, partial custody or visitation to either parent, the court shall consider, among other factors, which parent is more likely to encourage, permit and allow frequent and continuing contact and physical access between the noncustodial parent and the child.
>
> (23 Pa.C.S. 5303(a)(1), (2)).

The Court has considered Dr. Thomas' evaluation and expressed opinions and the fact that he had been somewhat constrained in fully examining the situation, due to his not having had the benefit of all the evidence which the Court heard, and, the fact that Harner had not been forthright during the custody evaluation process. As observed by Thomas, Olivia is a young girl whose memories of her family's household likely consist of the time she spent with Deeter and Karen, rather than that in the household which had consisted of Karen and Harner. Olivia cherished her

mother and her memories of Karen are of great importance to her. Olivia also loves her grandmother, Cooney, who has always been deeply involved in Olivia's life. Olivia also loves Deeter's family members, all of whom she considers as her family.

Olivia lost her mother and, when sad, seeks comfort from those who were close to her mother, including Deeter, Deeter's daughter, Cooney, Mrs. Header, and, from her best friend's mother, Mrs. Doyle. An antagonistic relationship existed between Karen and Harner prior to Karen's death which likely was apparent to Olivia. Notably, Olivia indicated that she would not seek solace from her father when sad. Olivia finds comfort in visiting and caring for her mother's grave on a regular basis. Her father has never been to the site, of which Olivia is surely aware. Olivia desires to attend her mother's church, about which she has happy memories. Olivia likes Pastor Dana, and she desires to become a schoolteacher like her mother had been.

Deeter has done what he thought was best for Olivia in seeking help to understand how to comfort her. He gets along well with Cooney, who is an extremely comforting figure for Olivia. In addition to providing financially for Olivia and covering her with health insurance, Deeter has consulted with Cooney in discussing plans to provide for Olivia's education after high school. Deeter has been consistently involved with Olivia's academics, including homework, and her school, extracurricular and community activities. Harner, on the other hand, did not testify to having made any financial preparations for Olivia's future and has had limited contact with Olivia's school. Harner does not get along with Deeter, Cooney or Olivia's best

friend's mother, Mrs. Doyle, and, has engaged in an angry tirade with Olivia's best friend Paige. Harner, further, did not know Olivia's teachers, her other friends' parents, or, her coaches, and, he expressed dissatisfaction with Pastor Dana.

Deeter is agreeable to take Olivia to Pastor Dana's church, where he had, on occasion, attended. As observed previously, Harner referenced his religious beliefs throughout his testimony. Although the evidence indicated that Harner had attended different churches, not having consistently attended any particular church over the last several years, the only church with which Olivia felt a connection was that served by Pastor Dana. As indicated, a desire to impart a religious belief system, and related moral principles, is a positive goal in serving the well-being of a child. However, the lack of credibility of Harner, the disconcerting evidence surrounding Bugdanavage and her discussions/letters with/to Olivia associated with religion, and, the activities in the Harner household to which Olivia and Paige had testified raise some concerns about the sincerity of Harner and the impact of the various activities/discussions upon Olivia. Similarly, the manner by which Harner and his wife will act toward, and, talk about Deeter and Cooney in Olivia's presence, in light of their past conduct, is cause for concern. Despite requirements in prior Court orders that all parties not disparage other parties, such admonition has not been followed. The fact that some disparaging apparently occurred in the context of religion discussions with Olivia is particularly disturbing.

The Court has examined the testimony of Olivia and her demeanor during her in-camera examination.

Olivia has been placed in the unhappy position of having to express her desire to live with Deeter, while having been pressured by Harner, his wife and Bugdanavage. That pressure has been described by Paige, has been revealed in some of Harner's and his wife's testimony, as well as in the testimony of Bugdanavage, and, in the latter's letters to Olivia. Clearly, Harner's position, as expressed by him or via Bugdanavage, had been that Deeter's desire to have custody of Olivia was unnatural, or worse. Bugdanavage's testimony and her letter to Children and Youth establish that she tried to paint Deeter as a danger to Olivia, presumably a sexual one. Bugdanavage's testimony that Olivia had claimed that Cooney had threatened to burn Karen's things and dolls was not credible and an apparent indirect attempt to disparage Cooney. The attempt to pervert the kind, loving relationships existing between Deeter and/or Cooney with Olivia into something to be perceived as evil or unkind in nature is troubling.

Upon being represented by an attorney, Olivia, apparently, gained the strength to express her feelings to the Court. Olivia presented herself as a quite intelligent, deliberative and polite child who does not want to hurt anyone's feelings, but who clearly considers her primary family as consisting of Deeter and his family, and, her home to be in Hegins. As Dr. Thomas testified, Olivia has suffered a tremendous loss and finds comfort with the people, places and things that involved Karen. Olivia has been comforted by Mrs. Header, who had been Karen's best friend. She is comforted by Cooney, the person consistently in her life since she was born. Olivia strongly enjoys attending her school and she wants to attend Pastor Dana's church. Olivia finds comfort in regularly

visiting Karen's grave. Dr. Thomas found that activity healthy and Olivia's testimony about doing so was not gloomy. Rather, she smiled and appeared quite content in discussing her trips to the site. Olivia has a close connection with the Deeter family and her friends and activities. Her reasons for desiring to live with Deeter are entitled to great weight, as they were expressed thoughtfully, are reasonable, and, further, directly relate to assuring Olivia's well-being by preventing further loss and its negative impact upon her emotional health.

Deeter and Cooney have extensive family who support Olivia. The Court learned little about any family network surrounding Harner, besides that of his wife, child and mother-in-law, the latter who Harner now desires the Court to believe will have limited, or at least supervised, contact with Olivia in the future.

The Court has considered that Olivia has a half-brother, Jacob, with whom she shares a bedroom at Harner's apartment. The principle that it is generally in the best interest of children to live together is both a material factor and to be given great weight in a custody case, as siblings should not be raised in separate households unless significant reasons exist to provide otherwise. Olivia primarily lives with Deeter and his daughter, Kylene. Although Kylene is not related to Olivia in the same manner as is Jacob, Olivia considers Kylene as her sister and she expressed limited interest in her brother. Nevertheless, Jacob is Olivia's half-brother and, per the law's general mandate, she presumably should be raised in the same house as that of Jacob. The exceptional circumstances of the case, however,

overwhelmingly establish that Olivia's emotional well-being outweighs the standard principle regarding siblings being raised in the same household.

The Court has considered the likelihood that Harner and/or Deeter would foster a relationship between Olivia and the other. All reliable evidence indicates that it is highly unlikely that Harner would foster any relationship between Olivia and any other person in this case, including Deeter or Cooney. Despite his testimony to the contrary, Harner consistently claimed previously that he wanted no contact to occur between Olivia and Deeter. Not only had Harner expressed such position, but so did his wife and his mother-in-law. Harner's claimed change of heart, similar to that of his wife's, is unbelievable. As noted previously, the proposed custody decree which Harner submitted for the Court to adopt includes no provisions for Olivia to see Deeter at all.

On the other hand, the demeanor, conduct and testimony of other witnesses, including the testimony of Dr. Thomas, indicate that should primary custody be placed with Deeter, he and Cooney would be willing to cooperate with each other and with Harner, and, would pose no impediment to the relationship between Harner and Olivia. The only impediments that will arise are those that may be expected to be caused by Harner.

Harner did not testify in any detail about his financial circumstances. Although he had indicated that his wife had obtained a job to pay bills and to provide insurance, at the end of the trial, Harner claimed that she was then pregnant and at some time in the future would be leaving her job. As Harner has

not provided health insurance for Olivia, he previously did not consistently provide financially for her, and as the evidence indicated that he has contributed nothing toward her clothing, medical or school expenses for nearly two years, it is unknown what the impact of his wife's quitting her employment may be on the financial situation in his household. Although Harner had left his home in Muir due to a foreclosure, moved to a home of Bugdanavage, and then, moved to his current two-bedroom apartment, he claimed that he intended to seek a larger residence with the anticipated birth of his third child. Whether he will actually do so, and the nature of such a residence cannot be reliably determined at this time.

Should Harner's wife quit her job, she, presumably, would be available to care for Olivia in the summer. Should she not do so, however, Harner indicated that he had not evaluated the type of care he would provide for Olivia during such time. Rather, Harner testified that Olivia may attend the same day-care as her four-year-old half-brother during the hours 8:00 a.m. to 5:00 p.m. daily. Evidence about the day-care, including the available activities and the ages of the attendees was not provided. Based on the record, the benefits afforded to Olivia by being with her family and friends and engaging in activities in her community during the summer days outweigh any that the record might indicate would inure to her by being supervised at the unknown day-care facility throughout the summer.

It would also be anticipated that, should Olivia live primarily with Harner, Olivia's best friend, Paige, would not visit her. This finding is based on Mrs. Doyle's testimony about the angry phone messages and calls from Harner and Paige's testimony about her

having been told that she had been selfish, the derogatory remarks that had been made about Lutherans and, Harner having screamed at Paige, causing her to cry, to be afraid of him and to be on the verge of tears in court when testifying about his phone call to her. Paige further has told her mother that she did not want to go to the Harner's home. Unless circumstances change, Mrs. Doyle, as a responsible parent, also will likely not change her position and allow Paige to visit Olivia.

The evidence overwhelmingly establishes that placing primary custody of Olivia with Deeter has promoted and will promote Olivia's interests academically, physically and emotionally. Further, her spiritual needs will best be served by her residing with Deeter. By residing with Deeter, Olivia may maintain contact with her friends, her comforting relationships, and she may attend her church: Under all the circumstances, the emotional trauma which Olivia likely will suffer should she be removed from her step-father's home is unacceptable. This determination is based on all the reliable evidence with particular weight placed on Dr. Thomas's testimony.

There is no question that Olivia loves both Deeter and Harner. Similarly, it is not in dispute that both Deeter and Harner have engaged in various enjoyable activities with Olivia. Olivia should spend time with both parties, provided, as Dr. Thomas testified, such experiences are not destructive to Olivia. The conduct and attitude of Harner directed to or expressed in reference to the other parties, and to those who are close to Olivia - including Paige, Mrs. Doyle and Pastor Dana - are destructive, as was his insistence that Olivia's love for and relationship with the other parties

were not worthy of maintaining. This is the position Harner had consistently professed until he testified at trial. His contrary testimony, to the effect that he now feels otherwise, is not credible.

Clearly, it is necessary that the animosity cease. The anger expressed by Harner toward so many people is very troubling. The fact that the Court could not learn the details of his prior conduct toward Karen and the reason for the ordered counseling in the custody action between Harner and Karen are also troubling, as is the fact that Harner never complied with those prior custody orders, including the final one directing that counseling continue "until discharged."

In light of the abuse evidence, it must also be noted that Pennsylvania statutory law provides the following with regard to proof in a custody case of violence and/or abuse:

> (3) The court shall consider each parent and adult household member's present and past violent or abusive conduct which may include, but is not limited to, abusive conduct as defined under the act of October 7, 1976 known as the Protection From Abuse Act.
>
> (23 Pa.C.S. 5303(a)(3)).

Although the above provision has been considered, in light of the evidence, the Court cannot make any definitive findings relative to the abuse allegations by Karen. Nevertheless, it is clear that counseling, necessary to address communication and anger issues, is dictated by the facts of this case.

Upon considering all of the evidence and the post trial filings of the parties, in which Deeter, Cooney and Olivia propose that the Court enter essentially the same custodial provisions, it is found that the requests of those parties are appropriate, with some modification. Following the trial, the Court entered an interim order which provided for Olivia to remain in Deeter's primary custody, and, modified the custodial provisions in favor of Harner. Those provisions shall remain essentially in effect. Deeter will be granted primary physical custody and Harner will be granted partial physical custody of Olivia every other weekend, together with additional custodial time during the weekends that Deeter maintains primary custody and two evenings on weekdays. Cooney will be granted a liberal schedule, with custody to be exercised during the time that Olivia is in Deeter's custody. As Deeter and Cooney are able to cooperate on scheduling, there is no need to delineate specific times for Cooney to exercise her custody. However, as her custodial periods shall coincide with Deeter's custodial time, Cooney's time with Olivia will not impact Harner's time with Olivia.

In addition, each party will be granted some exclusive summer custody with Olivia for the purpose of vacation. The Court does not find it appropriate, based on the evidence elicited, to have Olivia spend significant periods of time at a day-care, which would be the case if she were placed with Harner in the summer. However, in the event Harner should move to the Higgins area, as he indicated he had proposed, or should his wife leave her employment, as he indicated she might do, a modification of the summer schedule may be in order. The Court order also provides for a holiday schedule which follows the general past

practice of the parties, affords all parties time with Olivia and coincides with Olivia's desires. The custody terms, found to serve Olivia's best interest, provide for her to maintain frequent and appropriate contact with all parties. In fact, the custodial provisions in favor of Harner - should he exercise all time granted - will allow him to see Olivia every weekend and two weekdays of each week.

The intent of the custody order is to serve Olivia's well-being. Changes may occur in the future which require a modification of the physical custody provisions. However, at the current time, the evidentiary balance conclusively establishes by clear and convincing evidence that the presumption due the natural parent is substantially outweighed in favor of the positions asserted by Deeter, Cooney and Olivia, with the custodial provisions ordered deemed most appropriate to serve Olivia's physical, emotional, spiritual and moral well-being.

Deeter and Harner each desire to be awarded sole legal custody of Olivia. Cooney requests that Deeter exercise sole legal custody and, although only eleven years old, it is noted that Olivia has proposed in her suggested court order that legal custody be shared between Deeter and Harner. Generally, legal custody may be shared by parties, provided they are capable of making reasonable joint decisions, desire to be actively involved with the child, and, are able to cooperate. To work effectively, shared legal custody necessarily requires that the parties be able to rationally communicate.

The Court has great concerns about the ability of Deeter and Harner to properly communicate relative

to legal custody issues, and, in fact, with Harner's reaction to the entry of the order of the Court. Harner, apparently, could not communicate with Karen and the animosity he has expressed about Deeter is extreme. Similarly, the evidence indicates Harner had trouble communicating with others, including Cooney, Mrs. Doyle and Paige, without exhibiting anger. Ideally, Olivia would be best served if Harner communicated with Deeter and conducted himself responsibly when dealing with anyone else associated with Olivia. Many of the same issues that impacted the Court's determination of physical custody are important in the decision relative to legal custody, including the law's respect for the parent's fundamental right. Deeter has consistently exhibited good judgment when addressing Olivia's concerns. Harner, on the other hand - and as confirmed by Dr. Thomas - has frequently acted out of anger with his judgment impaired. Olivia's well-being requires that rational, thoughtful decisions be made on her behalf with her interests held paramount.

Although this case does not involve two parents, the following provision about counseling is worthy of note. Pennsylvania law provides:

> **(a) General rule.**--The court may require the parents to attend counseling sessions and may consider the recommendations of the counselors prior to awarding sole or shared custody. These counseling sessions may include, but shall not be limited to, discussions of the responsibilities and decisionmaking arrangements involved in both sole and shared custody and the suitability

of each arrangement to the capabilities of each parent or both parents.

23 Pa.C.S. 5305(a).

The Court will direct Harner and Deeter to attend conflict counseling in an effort to assist them in communicating about Olivia and exercising joint legal custody. The counselor shall determine whether he/she is also capable of providing, in such setting, counseling to address Harner's anger. In the event that is not possible due to conflict or ethical concerns, the counselor shall recommend an appropriate alternative provider to address Harner's long-standing anger issue and any possible abuse issue. Should Harner not desire to obtain such counseling via the conflict-counselor, or from any suggested referral by the counselor, he may obtain the counseling independently. Such independent counseling, however, will not serve to replace the required conflict counseling ordered to be attended by Plaintiff and Defendant Harner. The legal custody provisions entered by the Court will be of an interim nature. In the event Harner and Deeter are unable or unwilling to communicate in a rational, appropriate manner, the provisions on legal custody will be modified accordingly.

COURT OF COMMON PLEAS OF SCHUYLKILL COUNTY--CIVIL ACTION-LAW

No. S-1298-2007

[Filed April 8, 2009]

KENT DEETER,
Plaintiff

vs.

ERIC S. HARNER,
Defendant

and

SANDRA LEE COONEY,
Defendant.

IN CUSTODY

Karen E. Rismiller, Esquire - for Plaintiff
David R. Dye, Esquire - for Defendant Harner
Lori Schafer Guzick, Esquire - for Defendant Cooney
Maryann Conway, Esquire - counsel for Minor Child

ORDER OF COURT

RUSSELL, J.

AND NOW, this 8th day of April, 2009, it is hereby ORDERED custody of the minor child, Olivia Harner (born January 21, 1998) shall be as follows:

(1) **LEGAL CUSTODY** of Olivia Harner shall be shared on an interim basis by Plaintiff Kent Deeter and Defendant Eric Harner, who shall have authority to make decisions with regard to the minor child on important matters such as education, medical care and religious training. Plaintiff and Defendant Eric Harner shall have access to all school and medical records of Olivia;

(2) **PRIMARY PHYSICAL CUSTODY** of Olivia Harner shall be with Plaintiff Kent Deeter;

(3) **PARTIAL PHYSICAL CUSTODY** of Olivia Harner (Olivia) shall be with Defendant Eric Harner on alternating weekends from Friday at 7:00 p.m. until Sunday at 6:00 p.m.

In addition, as custody of the child during the weekdays shall continue to remain with Plaintiff, the parties are encouraged to arrange a schedule for Defendant Harner to exercise partial custody of Olivia for several hours during the weekends that she is in Plaintiff's custody. In addition, Defendant Harner may exercise custody of Olivia up to three hours after school or during the summer, twice a week, on weekdays. Defendant Harner must make certain that Olivia attends all of her school, sports and extracurricular activities during these visits, which shall not interfere with her normal bedtime and homework responsibilities during the school year. All transportation for the exercise of these limited weekend and weekday visits between Defendant Harner and Olivia shall be provided by Defendant. The purpose of these visits is not for Olivia to be transported to Defendant Harner's home, but to allow him to maintain frequent contact with Olivia to the

extent he desires. Again, the dates and times of the visits shall be arranged by the parties by mutual consent.

Finally, in the event Harner is available on days that Olivia has vacation from school, such as extended weekends, the parties may arrange for him to exercise custody on such dates also;

(4) **PARTIAL PHYSICAL CUSTODY** of Olivia Harner shall be with Defendant Sandra Cooney on an open and reasonable basis at times mutually agreeable to Plaintiff Kent Deeter and Defendant Sandra Cooney, during the periods of time that Olivia is not in Defendant Harner's custody;

(5) **Holidays** shall be shared by the parties as follows:

(A) Plaintiff and Defendant Eric Harner shall share custody on the holidays of New Year's Day, Easter, Fourth of July and Thanksgiving, with Plaintiff having custody of Olivia from 9:00 a.m. to 3:00 p.m., and Defendant Eric Harner having custody of Olivia from 3:00 p.m. until 9:00 p.m.;

Defendant Sandra Cooney shall have open and reasonable partial custody of Olivia on these holidays during Plaintiff's periods of custody;

(B) Plaintiff and Defendant Sandra Cooney shall have custody of Olivia every Labor Day weekend from Friday at 6:00 p.m. through Monday at 6:00 p.m.;

(C) Defendant Eric Harner shall have custody of Olivia every Memorial Day weekend from Friday at 6:00 p.m. through Monday at 6:00 p.m.;

(D) Plaintiff shall have custody of Olivia from Christmas Eve at 6:00 p.m. through Christmas Day at 3:00 p.m.

(E) Defendant Eric Harner shall have custody of Olivia from 3:00 p.m. Christmas Day through December 27th at 6:00 p.m.;

(6) Plaintiff shall have custody of Olivia from May 29, 2009 through May 31, 2009, so Olivia can participate in and attend Deanna Deeter's wedding;

(7) Plaintiff and Defendant Eric Harner shall each be entitled to two (2) non-consecutive weeks of exclusive time in the summer with Olivia for purposes of vacation upon providing thirty (30) days written notice to the other parties. As Plaintiff has already proposed one vacation period for the calendar year 2009, Plaintiff shall have custody of Olivia from June 20, 2009 through June 27, 2009, for vacation. Defendant Cooney may exercise custody of Olivia in the summer for two non-consecutive weeks, provided the weeks coincide with the time Olivia would otherwise be in the custody of Plaintiff;

(8) Except as otherwise stated previously, the parties shall share transportation for the exercise of Defendant Harner's custody periods by Plaintiff delivering Olivia to Defendant Eric Harner at the beginning of Defendant's custodial periods and Defendant Eric Harner returning Olivia to Plaintiff at the conclusion of Defendant's custodial periods.

Plaintiff and Defendant Cooney may arrange the transportation for Defendant Cooney's custody periods as they may agree;

(9) The parties shall make certain that Olivia participates in all school, community and extra-curricular activities in which she engages. In this regard, the person who has physical custody of Olivia at the time of any event such as, but not limited to, games, tournaments, practices, scrimmages or concerts shall provide transportation so that Olivia attends each such activity on time;

(10) Defendant Harner shall not allow Jill Bugdanavage to have unsupervised contact with Olivia;

(11) Any additional partial custody can be arranged by the parties by mutual consent;

(12) All parties are directed to encourage Olivia to love and respect the other parties and are prohibited from making any derogatory remarks about the other parties in the presence of Olivia or permitting anyone else to make such remarks about the other parties while Olivia is in their custody;

(13) Plaintiff and Defendant Harner shall attend custody conflict counseling and shall continue with the counseling until successfully discharged. Plaintiff and Defendant shall immediately make arrangements, through their counsel, to agree upon the identity of an appropriate counselor and to arrange for the first appointment. If the parties are unable to agree on the identity of the counselor, the Court will appoint a counselor upon request to do so. In addition to conflict

counseling, the counselor shall address with the parties the responsibilities and decision-making arrangements involved in shared legal custody and the suitability of such arrangement to the capabilities of the parties. If the counselor finds such advisable, Defendant Cooney and/or Olivia shall participate in the counseling. The parties shall sign authorizations for the counselor to provide a report of the results of the counseling and the counselor's recommendations about the sharing of legal custody to the Court as hereafter provided. Upon finalization of such counseling, either party may file a motion with the Court, requesting that the terms pertaining to legal custody as set forth in Paragraph (1) hereof be entered as a final order or that other relief be granted. In the event the parties do not submit a final stipulation referable to legal custody, the motion shall be accompanied by a request for the scheduling of a custody conciliation conference at which the report of the counselor shall be considered. Any uncovered expenses related to such counseling, and the preparation of the report, shall be shared equally by Plaintiff and Defendant Harner;

(14) Should the conflict counselor be unable to fully address the issue of anger and potential issue of abuse involving Defendant Harner, due to the nature of the conflict counseling setting, ethical considerations, or otherwise, the counselor shall provide a referral to Defendant Harner for independent counseling to address such matters to the extent they may impact the well-being of Olivia. With the exception of the conflict counseling, however, Defendant Harner may choose to obtain independent counseling to address the other issues in question. Defendant Harner shall obtain and shall continue with anger management or

such other counseling as may be deemed necessary by the counselor until successfully discharged;

(15) The attached general guidelines are incorporated herein and made a part of this order.

BY THE COURT,

/s/ Russell J. J.

GENERAL GUIDELINES FOR CHILD CUSTODY AND VISITATION

These guidelines are provided to help the parties be responsible, reasonable, and flexible in carrying out a child custody and visitation schedule for the best interest of your child. Naturally, they are general and do not address every problem.

1. The Court Order must be strictly followed. The parties can, however, deviate from some or all of the provisions of the order if, and only if, all parties agree to do so. If it becomes desirable or necessary to change the order, the parties shall use their best efforts to reach agreement before resorting to the court. In the event that the parties cannot reach on agreement, or if one party no longer wishes to continue with a change in a manner previously agreed upon, or if there are disputes concerning the order, the parties may not and shall not disobey the order, but shall instead petition the court for modification of the order.

2. Use the Court Order or agreement as the basic blueprint and adapt it to fit your changing needs. However, if you cannot agree to changes with the other

party, then all parties must obey the schedule set out in the Court Order.

3. All parties shall be responsible and flexible in making or responding to requests for changes. The matter of custody and visitation extends for years, and circumstances are bound to arise when the parties will need a favor from the other parties. That favor is not likely to be granted if the other parties have been unreasonable and inflexible. If a situation occurs, contact your Lawyer. Do not simply disobey the Order or agreement.

4. No parties shall use the child as a messenger, but shall communicate directly with the other parties concerning any proposed modifications of the custody arrangements. Furthermore, no party shall discuss with the child any such matters prior to discussing the matter and reaching an agreement with the other parties.

5. No party generally has the right to be in the homes of the other parties without express permission.

6. No party shall use illegal drugs or drink an excessive amount of alcohol at any time, but especially not before or during periods of custody or visitation.

7. Transportation of the child by automobile by the parties (or anyone else) should be in an automobile which is in good running condition, currently inspected, registered, and insured, and driven in a safe manner by a responsible driver with a current valid driver's license.

8. The child should be delivered on time.

9. If any portion of the preceding Stipulation or Order to which these guidelines are attached is specifically contradictory to these general guidelines, the Stipulation and/or Order supersedes. **These are only general guidelines.**

APPENDIX C

IN THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT

No. 175 MAL 2010

[Dated May 3, 2010]

K.D.	)
	)
v.	)
	)
E.S.H. AND S.L.C.	)
PETITION OF: E.S.H.,	)
	)

Petition for Allowance of Appeal from the Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 3rd day of May, 2010, the Petition for Allowance of Appeal is hereby **DENIED**.

TRUE & CORRECT COPY
ATTEST: MAY 3, 2010

/s/ Elizabeth Zisk
Elizabeth Zisk, Chief Clerk

APPENDIX D

The following states require parental unfitness before encroaching upon the parent/child relationship

Alabama - *Ex parte A.M.R.*, 4 So. 3d 472, 477 (Ala. 2008) (quoting *Ex parte Terry*, 494 So. 2d 628, 632 (Ala. 1986)) ("the right of the natural parent to the custody of his or her child, as against the right . . . of a nonparent, is 'grounded in the common law concept that *the primary parental right of custody is in the best interest and welfare of the child as a matter of law.* So strong is this presumption, absent a showing of voluntary forfeiture of that right, that it can be overcome only by a finding, supported by competent evidence, *that the parent seeking custody is guilty of such misconduct or neglect to a degree which renders that parent an unfit and improper person to be entrusted with the care and upbringing of the child in question.*'");

Alaska - *Evans v. McTaggart*, 88 P.3d 1078, 1085 (Alaska 2004) ("in order to overcome the parental preference a non-parent must show by clear and convincing evidence that the parent is unfit. . . ."),

Arkansas - *Devine v. Martens*, 263 S.W.3d 515, 523 (Ark. 2007) ("The law prefers a parent over a grandparent or other third person unless the parent is proved to be incompetent or unfit.");

Idaho - *In re Baby Boy Doe*, 88 P.3d 749, 756 (Idaho 2004) (quoting *Stockwell v. Stockwell*, 775 P.2d 611,

613 (Idaho 1989)) ("Idaho courts apply a presumption that a natural parent should have custody as opposed to other interested parties. This presumption operates to preclude consideration of the best interests of the child unless the non-parent demonstrates either that the natural parent has abandoned the child, that the natural parent is unfit or that the child has been in the non-parent's custody for an appreciable period of time.");

Indiana - *In re B.H.*, 770 N.E.2d 283, 285 (Ind. 2002) (quoting *Gilmore v. Kitson*, 74 N.E. 1083, 1084 (Ind. 1905)) ("'natural parents are entitled to the custody of their minor children, except when they are unsuitable persons to be entrusted with their care, control, and education.");

Iowa - *In re Guardianship of Blair*, 2003 Iowa App. Lexis 102, at *11 (2003) (citing *In re Marriage of Halvorsen*, 521 N.W.2d 725, 729 (Iowa 1994) ("Any decision to place custody of a child with a nonparent . . . requires the court to make a parental unsuitability determination.");

Kansas - *In re Adoption of G.L.V.*, 190 P.3d 245, 263 (Kan. 2008) (quoting In re *Guardianship of Williams*, 869 P.2d 661, 670 (Kan. 1994) ("absent highly unusual or extraordinary circumstances the parental preference doctrine is to be applied . . . when the dispute is between a natural parent who has not been found unfit and a non-parent.");

Louisiana - *Wood v. Beard*, 290 So. 2d 675 (La. 1974). When the parent competes with a non-parent of the child, the parent's right to custody is superior unless

the parent is unable or unfit, having forfeited parental rights.

Maryland - *Koshko v. Haining*, 921 A.2d 171, 192 (Md. 2007) ("If third parties wish to disturb the judgment of a parent, those third parties must come before our courts possessed of at least *prima facie* evidence that the parents are either unfit or that there are exceptional circumstances warranting the relief sought before the best interests standard is engaged.");

Nebraska - *In re D.J.*, 682 N.W.2d 238, 244 (Neb. 2004) ("We have repeatedly held that a court may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship, or he has forfeited that right.");

New Hampshire - *In re Baby Girl P.*, 802 A.2d 1192, 1201-02 (N.H. 2002) (quoting *Deboer v. Deboer*, 509 U.S. 1301, 1302 (1993));

New Jersey - *Moriarty v. Bradt*, 827 A.2d 203, 220 (N.J. 2003); *Matter of Esposito v. Shannon*, 32 A.D.3d 471, 472 (N.Y. App. Div. 2006) (citing *Merritt v. Way*, 58 N.Y.2d 850, 852 (N.Y. 1983) ("In a custody contest between parent and nonparent, the question of best interest is not reached absent a showing of . . . extraordinary circumstances.");

North Carolina - *David N. v. Jason N.*, 608 S.E.2d 751, 752-53 (N.C. 2005) (quoting *Peterson v. Rogers*, 445 S.E.2d 901, 905 (N.C. 1994) ("this Court held that 'absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the . . . right of natural parents to custody . . . must prevail.'");

North Dakota - *In re Barros*, 701 N.W.2d 402, 407 (N.D. 2005) ("Absent exceptional circumstances the natural parent is entitled to custody of the child even though the third party may be able to offer more amenities.");

South Dakota - *In re Guardianship & Conservatorship of A.L.T.*, 712 N.W.2d 338, 348 (S.D. 2006) (quoting *Matter of Guardianship of T.L.R.*, 645 N.W.2d 246, 250 (S.D. 1992)) ("When a non-parent seeks custody, the threshold question is whether the parent is fit to have custody of the child. . . . 'The parents' right to custody over their own children should never be disturbed except upon clear showing against the parent of "gross misconduct or unfitness, or of other extraordinary circumstances. . . ."'");

Vermont - *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 966-67 (V.T. 2006) (quoting *Paquette v. Paquette*, 499 A.2d 23, 30 (V.T. 1985) ("where the stepparent has assumed the role of a parent . . . that is, had acted in 'in loco parentis'-the lower court can give custody to the stepparent . . . if it finds that it is in the best interest of the child to do so and 'the natural parent is unfit or . . . extraordinary circumstances exist . . .'");

Virginia - *Florio v. Clark*, 674 S.E.2d 845, 847 (VA 2009) (quoting *Bailes v. Sours*, 340 S.E.2d 824, 826-27 (VA 1986)) ("'Although the presumption favoring a parent over a non-parent is a strong one, it is rebutted when certain factors are established by clear and convincing evidence. We have held that such factors include: (1) parental unfitness. . . .'");

West Virginia - *Clifford K. v. Paul S. ex rel. Z.B.S.*, 619 S.E.2d 138, 160 (W.V. 2005) (quoting *Rozas v. Rozas*,

342 S.E.2d 201, 205 (W.V. 1986) ("absent a showing that a natural parent is unfit, a natural parent's right to custody outstrips that of a grandparent.");

Wisconsin - *In re James D.K.*, 718 N.W.2d 38, 47 (Wis. 2006); *In re MEO*, 138 P.3d 1145, 1161 (Wyo. 2006) ("A child with a parent has a natural guardian and is not in need of a court-appointed guardian, unless the court determines that the child's natural guardian is not fit.").

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(3)

No. 10-204

Supreme Court, U.S.
FILED
OCT 13 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

E. S. H.,

Petitioner

v.

K. D., et al.

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the United States Supreme Court has jurisdiction where Petitioner Eric S. Harner failed to present to the state courts below the issues raised in his Petition for Writ of Certiorari?

II. Whether Petitioner has presented compelling reasons for this Court to grant the Writ for Certiorari, where:

A. The state trial court determined that Petitioner posed a significant, real threat of harm to his child, O.H., and therefore precluded Petitioner from enjoying the presumption that he would make decisions in the best interests of the child?

B. Where the trial court properly weighed Petitioner's right to physical custody of O.H., while applying the statutorily-required best-interests analysis, rather than the "actual harm" standard advocated by Petitioner?

C. Where this Court's plurality decision in *Troxel v. Granville* is neither factually nor procedurally applicable to the instant case?

D. Where the trial court found as a matter of fact that Petitioner acquiesced to stepfather K.D. acting as a *de facto* parent, and therefore held that K.D. had standing *in loco parentis* to seek custody of O.H?

E. Where Petitioner fails to also challenge the trial court's determination that S.C., the maternal grandmother, has standing to seek partial custody?

F. Where Petitioner ignored the wishes of the child, O.H., to live primarily with K.D. and partially with Petitioner?

PARTIES TO THE PROCEEDINGS

The parties to this proceeding are Respondent, the original plaintiff in this custody action and stepfather of O.H., Kent Deeter (hereinafter K.D. or Stepfather), who acted as a *de facto* parent to O.H. during her Mother's frequent illness and after her Mother succumbed to that illness; Respondent Sandra L. Cooney (hereinafter S.C.), the maternal grandmother, to whom Petitioner agreed to give *in loco parentis* standing and partial custody of O.H.; and Petitioner Eric S. Harner (Petitioner or Father), the biological father of O.H. and original defendant.

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STATEMENT OF THE CASE

A. Factual and Procedural History

The instant custody matter concerning nine-year-old, O.H. arose as the result of the death of her mother, Karen Deeter (hereinafter Mother) on May 23, 2007. Mother and Father, Eric S. Harner (hereinafter, Petitioner) married in 1995, and their daughter O.H. was born in 1998. Shortly thereafter, Mother developed an incurable disease of the liver, Walter Payton's disease, also called primary sclerosing cholangitis. Petitioner was aware that approximately every three months, this disease incapacitated Mother, until her death in 2007.

Mother separated from Petitioner in April of 2001 when O.H. was three years old. Shortly after the separation Mother filed a Protection From Abuse complaint against Petitioner, which was granted as a permanent order. Mother and Petitioner were eventually divorced in April of 2004. That same year Petitioner remarried. In February of 2005 Mother and O.H. moved into the home of K.D., and in March of 2006, Mother and K.D. were married.

With the permission of Mother, K.D. was listed on O.H.'s emergency contact cards and permission slips. He provided primary care to O.H. during the periods that Mother illness prevented her from doing so. On Fridays and when K.D. was laid off from work, he cooked, cleaned and had breakfast with O.H. He packed her lunch and school bag. K.D. took O.H. to friends' and relatives' houses, participated in fundraisers for her extracurricular activities, delivered Girl Scout cookies,

took her to cheerleading practice and tournaments, and football, softball and basketball games. He attended parent-teacher conferences, maintained communication with O.H.'s teachers, attended her concerts and plays, signed homework, helped O.H. paint her room, created a play room for her within his home, bought her a dog "Charlie," and did her laundry. During the years O.H. lived with K.D. and her mother, Petitioner never objected to K.D.'s involvement in O.H.'s life, nor did he ask to modify his partial custody arrangement. Since Mother's death, K.D. has been paying to provide O.H. with health insurance and, without contribution from Petitioner, co-pays doctor, prescription and dentist bills. Father has not paid support since Mother died and K.D. has not asked for support.

During Mother's life, Petitioner never contacted O.H.'s teachers, or knew their names, or her coaches' names, or attended any events. Petitioner relied on his wife to keep track of O.H.'s extracurricular activities. The custody order in effect at the time of Mother's death provided Mother with primary physical custody and Petitioner with partial physical custody every other weekend and every Wednesday evening for two and one-half hours.

On May 24, 2007, one day after Mother's death, Petitioner came to K.D.'s home demanding full custody of O.H., and took the child to his home in another county. K.D. filed a complaint for custody against Petitioner on May 30, 2007, seven days after Mother's death. S.C. (Sandra Cooney, maternal grandmother of O.H.) filed a complaint as an additional defendant on June 8, 2007. A lengthy trial ensued. The court-appointed evaluator

recommended, *inter alia*, that O.H. remain primarily in K.D.'s custody, that the maternal grandmother S.C. continue to have significant contact with O.H. and that Petitioner be treated for anger issues. The evaluator was concerned that the issue of loss was the dominant theme in O.H.'s life. The evaluator expressed concern that O.H. would be further injured by removing her from the home she lived in with her mother, from the school she loved, from the place where her mother is buried, from all of her friends and her dog, from her extended maternal family, and from the people, activities and church that had become a significant part of her mother's and O.H's life.

O.H. testified at the trial. She described K.D.'s home as her home; described K.D. as "like a Dad", and expressed her desire, and explained her reasoning, to have things remain the way they were when her mother was alive.

On April 8, 2009 the trial court entered a 92 page Opinion and Order finding K.D. had standing *in loco parentis* and S.C. had standing statutorily to seek custody of O.H. The trial court's opinion is attached as Appendix B to the Petition for Writ of Certiorari.

In the Opinion, the trial court determined that Petitioner was an unreliable witness. The court identified specific facts and detailed numerous instances where Petitioner's conduct was so damaging that Petitioner was found to "pose harm or a significant, real threat of harm to [O.H.]." Trial Court Opinion dated April 8, 2009 ("Trial Court Opinion"), reproduced in the Petition for Writ of Certiorari ("Petition"), at Appendix ("App.") B, page 109a.

In applying the statutorily mandated best interest analysis, the trial court granted shared legal custody to Petitioner and K.D., primary physical custody to K.D., and partial physical custody to Petitioner. S.C.'s partial custody was to be exercised during K.D.'s periods of custody. Petitioner was also ordered to attend parent counseling with K.D. and to attend additional counseling for "long-standing" anger issues. *Id.* at 123a.

Petitioner timely appealed to the Pennsylvania Superior Court, which affirmed the trial court in an unpublished opinion dated December 21, 2009 and which is attached as Appendix A to the Petition. Petitioner requested a writ of certiorari to the Pennsylvania Supreme Court, which was summarily denied on May 3, 2010.

B. Correction of Misstatements Pursuant to Supreme Court Rule 15

Supreme Court Rule 15 requires that if we perceive that Petitioner has made any misstatements of fact or law in his Petition for Writ of Certiorari, we must notify the Supreme Court that we do not agree with his statements, or the misstatements are deemed waived. There are multiple factual misstatements in the Petition.

1. Father states in his Petition at pages 2 and 21 that "Father has remained a constant presence in O.H.'s life since her birth[,]" and that he "was always active and involved in O.H.'s life..." This is a misstatement. As described above, Petitioner had little if any involvement in O.H.'s life and had custody only on alternating weekends. Trial Court Opinion, Petition, at App. B, page

28a, 83a. He did not attend her events, teacher conferences, or doctor's appointments. *Id.* at 77a-79a. He failed to carry health insurance for her or pay child support to Mother and in fact was incarcerated for failure to pay child support during Mother's life. He has contributed nothing towards her clothing, medical or school expenses for nearly two years. *Id.* at 79a -80a.

2. Petitioner misstates in his Petition at pages 2 3 that he "enjoyed custody on three out of four weekends per month." The trial court found that Father had partial custody on alternating weekends, not three out of four weekends per month. *Id.* at 28a, 83a.

3. Petitioner misstates in his Petition at page 3 that "Father's fitness to parent his child has never been questioned." The trial court found as a matter of fact that Father had been found guilty of Harassment as to Mother; was the subject of a Protection from Abuse Order entered during Mother's lifetime; failed to pay child support; failed to attend OH's games, plays, and concerts, or even to know who the relevant people in her life were; failed to attend parent-teacher conferences, or even to know who O.H.'s teachers were; failed to object to K.D. acting *in loco parentis* during Mother's life, or to make any attempt to parent O.H. during the times of Mother's incapacitation. The lower court found, in effect, that Petitioner's acts and failures to act rendered him unfit as a parent and that the presumption of a parent's right to make decisions in the best interests of O.H. was outweighed by the need for the State, K.D., S.C. and O.H. to "assure that the health and emotional welfare of [O.H.] are protected, in particular, such as here, where actions by her parent

pose harm or a significant, real threat of harm to [O.H.]." Trial Court Opinion, Petition, at App. B, page 109a.

4. Father misstates in his Petition at pages 3 and 21 that he "never consented to K.D.'s assuming parental status and never relinquished parental authority to K.D. . . . [and that] K.D. acted in the limited role of a care-giver consistent with his marriage to Mother." This is the basic premise of one of Appellant's arguments, and is a complete misrepresentation of the facts found and affirmed in the lower state courts. Both the trial court and the Pennsylvania Superior Court found that:

- Father was well aware of Mother's illness (Trial Court Opinion, Petition, at App. B, page 77a);

- Father knew that K.D. was providing care for O.H. during Mother's life (*Id.* at 77a);

- Father knew that K.D. was supporting O.H. financially, especially since Father had been incarcerated for non-support;

- Father did not object when K.D. provided for O.H. financially, handled her academic or medical issues or her extra-curricular activities.

- Father also ignores the fact that Mother permitted K.D. to care for O.H. during her frequent periods of incapacity and wished

her to continue living with K.D. after her death. *Id.* at 105a.

5. Father understates Mother's condition in his Petition at page 3: "[t]hroughout her adult life, Mother suffered from primary sclerosing cholangitis," became sick with pneumonia and then died." Mother died from primary sclerosing cholangitis, and from the time of O.H.'s birth had been hospitalized and incapacitated frequently because of the disease. When Mother was severely ill and still living with Petitioner, S.C. had to come to Petitioner's home to care for O.H. Petitioner knew that Mother's illness was completely debilitating and reoccurred frequently.

6. Petitioner misstates at pages 3-4 that he "always strenuously objected to K.D. seeking *in loco parentis* status...." In fact, Petitioner did not object to K.D. acting as a *de facto* parent during mother's frequent incapacitation during her illness. After Mother's death, and after K.D. filed his Complaint for Custody, Father *then* objected to K.D.'s parental role in O.H.'s life. Prior to that, Father has never objected to K.D. providing health insurance and financial and emotional support to O.H.

REASONS FOR DENYING THE PETITION

I. This Court Lacks Jurisdiction Because Petitioner Failed to Raise The Issues Below

Respectfully, this Honorable Court lacks jurisdiction over the issues Petitioner is presenting to this Court. Petition failed to raise these issues before the Pennsylvania courts.

This is a custody case, and other than random, unintelligible statements concerning "fundamental parental rights," Petitioner never asked the Court of Common Pleas of Schuylkill County, Pennsylvania to consider applying a strict scrutiny analysis to a parent's rights as articulated by *Troxel v. Granville*, 530 U.S. 57 (2000), nor did Petitioner ask the trial court to consider whether Pennsylvania's *in loco parentis* doctrine is unconstitutional, or whether Pennsylvania's statutes that requires its courts to consider the best interests of the child violated the United States Constitution. In fact, nowhere in the Petition for Writ of Certiorari does Petitioner even cite the Pennsylvania statute requiring the court to consider factors that concern the best interests of the child and the child's physical, intellectual and emotional well-being. 23 Pa.C.S. § 5303(a)(1). Petitioner fails to raise with this Court and has never asked the Pennsylvanian courts to address the constitutionality of the statutorily based best-interests analysis. Petitioner merely makes bald and unspecific allegations of a constitutional violation not raised in lower state court and not addressed by the state courts.

This Court need only read the trial court's lengthy ninety-two (92) page opinion to see that Petitioner never raised these constitutional issues before the trial court. Trial Court Opinion, Petition, at App. B, pages 25a-132a. The trial court acknowledged the fundamental right of a fit parent to make decisions regarding the care, custody and control of their child. *Id.* at 105a and 109a. *Troxel*, however, is mentioned only in footnote 8 of the opinion when the trial court noted Justice Steven's comment about the rights of the child and their interests, which he correctly notes as being implicated in every custody case. *Id* at108a n.8. The trial court's opinion does not contain any mention of a challenge to any Pennsylvania case or statute by the Petitioner based on the United States Constitution or the Fourteenth Amendment.

After the trial court entered its Opinion and Order, Petitioner did not ask for rehearing to raise these issues. Petitioner instead appealed the decision to the Pennsylvania Superior Court. That unpublished and non-precedential decision is found in the Petition at Appendix A, 1a-24a. The issues raised by Petitioner in his brief to the Pennsylvania Superior Court were listed verbatim within that court's opinion. Pennsylvania Superior Court Opinion ("Superior Court") filed December 21, 2009, attached to the Petition at App. A, page 5a. Petitioner raised two issues involving any mention of a constitutional challenge:

> II. Whether the [trial] court deprived [Father] of his constitutional right to parent and direct the upbringing of his child?

> III. Whether [Father's] [p]rocedural [d]ue [p]rocess rights under the Fourteenth Amendment were violated when the [trial] [c]ourt issued its interim [o]rder requiring the child to remain in the custody of [Stepfather], a third party, pending the outcome of the custody trial[?]

App. A at 5a.[1] The Superior Court dismissed Petitioner's Issue III as waived. Petition, App. A at 15a. The Superior Court addressed Issue II, but only in terms of the Pennsylvania Supreme Court's decision in *Shepp v. Shepp*, 906 A.2d 1165 (Pa. 2006), which applies a strict scrutiny analysis to a parent's fundamental rights, and which the Superior Court found inapposite to this case. Petition, App. A at 13a. The Court further addressed Issue II by affirming the trial court's proper application of the bests interests analysis to this child, in this case, one in which the trial court found the natural parent, Petitioner, to be, essentially, an unfit parent, which is addressed below.

Our Pennsylvania Supreme Court denied Petitioner's Writ for Certiorari without opinion.

We believe Petitioner's failure to raise these particular issues specifically below is evidenced by his

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1. The other two issues involved challenges as to whether the trial court erred in granting *in loco parentis* standing to the stepfather to seek custody of the child, and whether the stepfather failed to meet his burden of proof in the best interests analysis. Petitioner's fifth issue, the fourth issue listed in his brief before the Superior Court, was actually a typographical error and was omitted from the Superior Court's opinion.

failure to follow Supreme Court Rule 14(g)(i). Petitioner's Concise Statement of the Case fails to include this required information because he did not specifically raise these issues to the state courts. As a result, the state courts were unable to address or even consider the issues now contained in the Petition for Writ of Certiorari.

Petitioner states that both the trial court and the Pennsylvania Superior Court "refused to recognize" *Troxel*, and his reliance on *Troxel* in the case of the Superior Court Opinion, (Petition at 6, 8), but Petitioner does not state exactly when, where and how he raised any United States Constitutional issue before either the trial court, the Pennsylvania Superior Court, or the Pennsylvania Supreme Court, as required by Rule 14(g)(i). Thus, the issues are waived, and respectfully, this Court does not have jurisdiction over them.

II. No Compelling Reasons Exist To Grant Certiorari In This Matter

None of the Pennsylvania courts in this case decided any issue involving an important federal question, let alone one that conflicts with relevant prior decisions of this Court. This is a custody case in which a biological parent, who was found to pose harm to his child, is seeking to remove that child from her now-deceased mother's home, family, and community. Petitioner is attempting to change the findings of the trial court and the holdings of the Pennsylvania courts into a vehicle for the Supreme Court to create a national standard for custody: namely, to require a showing of actual harm to the child before a natural parent may lose custody.

To push this agenda, Petitioner has misstated the clear determinations of the trial court to fit a scenario and bolster the issues he wishes to present to the Court, even though the issues were not addressed or raised below, and his representations are not supported by the record. For the following additional reasons, this Court should deny the Petition for Writ of Certiorari.

A. Petitioner's Rights as a Parent to Have Primary Custody of his Child Were Adequately and Carefully Considered but Ultimately Outweighed by the State Trial Court's Finding That Petitioner's Actions "Pose Harm or a Significant, Real Threat of Harm" to the Child.

Although we believe these issues waived, we will proceed to briefly address the merits of Petitioner's claims and address why this Court should not grant the Petition for Writ of Certiorari.

Petitioner calls himself a "fit parent" and suggests that, based on his version of the facts of this case, this Court should adopt a standard, applicable to all state court custody cases, that unless there is proof of *actual harm* to a child by a parent, that parent should have custody of the child regardless of anything else, including the child's rights and wishes. Petitioner is not, however, a "fit" parent, and is therefore not entitled to a presumption that he will make decisions which are in the best interests of O.H.

The trial court spent much of its opinion reviewing Petitioner's interactions with the child and other family

members, as well as the stepfather, maternal grandmother and their families, and concluded that Petitioner's "actions . . . pose harm or a significant, real threat of harm to [the child]."[2] Petition, App. B at 109a. The trial court recommended and ordered that a counselor address Petitioner's anger issues and any possible abuse issues. *Id.* at 123a, 129a. Petitioner was ordered to obtain and continue with anger management and other counseling, as deemed necessary, until successfully discharged by the counselor. *Id.* at 129a-130a. Further, Petitioner's mother-in-law is not allowed to have unsupervised contact with the child based upon the determination of the trial court that much of her testimony at trial was "disturbing in the context of a custody action involving a young child" and was not credible. *Id.* at 50a,128a.

Petitioner throughout the appeal process has continued to call himself a "fit" parent, despite the clear findings of the trial court. Petitioner is basing his appeal upon fabricated or misinterpreted factual determinations of the trial court. Petitioner's "fundamental" rights as a parent, and to parent, were adequately and carefully considered by the trial court. The only way he can argue that he should have custody is by ignoring the trial court's findings as to his "fitness." If this Court wishes to visit the issue of a biological parent's Constitutional right to parent and be a parent versus other factors such as best interests of the child, this is not the set of facts upon which the Court should base such a determination.

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2. During the proceedings, the trial court felt it necessary to appoint separate legal counsel for the child.

B. *Troxel* is Factually Distinguishable from This Case and Should Therefore Not Be Applied.

Troxel is factually distinguishable from this case because it involved a suit for visitation by the children's paternal grandparents, under a sweepingly broad Washington state statute, which its highest court had already deemed unconstitutional. Father had died, and prior to his death only had visitation rights with the children on weekends. *Troxel*, 530 U.S. at 60. Mother, a fit parent (and with no concerns expressed about her parenting abilities whatsoever), wished to limit but not end the visitation. The grandparents wished to have more visitation time against Mother's wishes. *Id.* at 60-61, 68. The Washington statute allowed anyone, at any time, to petition a court for visitation rights, and accorded no deference or weight to the parent's choices regarding visitation. *Id.* at 67. This Court held that the Washington statute infringed on a fit parent's fundamental right to parent and be a parent. *Id.*

Several key points distinguish this case from *Troxel*. Here, the trial court below described Petitioner in terms which can only be used to describe an unfit parent. *Troxel* involved a fit parent, who was able to make decisions and act in the best interests of her children; therefore, she was entitled to a presumption before the state court that she would make decisions in the best interests of her children.

Petitioner is not a fit parent and is not able to make decisions and act in his child's best interests. The trial court considered the harm Petitioner was found to pose

to O.H. and awarded primary physical custody to K.D. Therefore, *Troxel*'s holding that

> so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children

simply does not apply here. *Id.* at 68-69.

Second, *Troxel*'s main issue was whether a Washington visitation statute violated the Federal Constitution. The Petition for Writ of Certiorari does not quote or even cite any Pennsylvania custody statute that may be at issue.

Third, the Washington lower courts imposed their belief of what was in the best interest of the child onto the fit Mother, without taking her wishes into consideration. That is not the case here. The trial court carefully weighed Petitioner's wishes, as well as all of the factors required to be considered by Pennsylvania statutory law, including the child's wish to live primarily with her stepfather and visit regularly with her father. Petitioner was found to essentially be an unfit parent, and since a disposition in favor of Petitioner would cause harm to the child, the Court decided that he should not have primary custody of the child.

Finally, there was no evidence in *Troxel* that the Mother wished to cut off visitation with the paternal

grandparents entirely; she just wished to decrease it. *Troxel*, 530 U.S. at 71. Here, the trial court found that Petitioner would not continue a relationship between O.H. and her mother's new family; the trial court stated, "All reliable evidence indicates that it is highly unlikely that [Father] would foster any relationship between [O.H.] and any other person in this case, including [K.D] or [S.C]." Trial Court Opinion, Petition at App. B., page 116a.

For these reasons, this Court should find *Troxel* inapplicable to the case at hand.

C. Petitioner is not a "Fit Parent" and The Pennsylvania Trial Court Correctly Applied *In Loco Parentis* to Give the Child's Stepfather Standing To Ask for Physical Custody Over the Child

Petitioner argues that Pennsylvania's *in loco parentis* doctrine violates his fundamental rights to parent his child as stated in *Troxel*. He misrepresents to this Court that he is a "fit parent" and that he never agreed to K.D. exercising parental authority over the child, calling K.D. a mere "squatter" to Petitioner's rights to his child, as if the child is a chattel. Petition at 22. Petitioner's fitness is addressed above. Petitioner ignores the fact that the trial court and the Pennsylvania Superior Court found that Petitioner knew of, and acquiesced to, K.D.'s care for and support of the child. Petitioner ignores three other facts: first, that O.H.'s deceased mother wished her to be parented by the stepfather; second, that Petitioner only opposed giving standing to the stepfather but not to the maternal

grandparent; and third, that the child desired to live with her stepfather and have regular visits with her father. His argument, therefore, is based on factually inaccuracies and contains no compelling reason for this Court to consider granting his writ of certiorari.

Petitioner's argument that he never agreed to K.D. being a parent to O.H. is a fact-based argument unsupported by the record below and against the findings of the trial court, affirmed by the appellate court. This is not an argument worthy of the attention of this Court.

Both the trial court and Pennsylvania Superior Court found, contrary to Petitioner's argument, that Petitioner knew 1) Mother was very sick ever since O.H. was born and at times was incapable of caring for their child, and that K.D. cared for the child during those times; 2) that K.D. was providing for both Mother and O.H. financially, especially when Petitioner was incarcerated on one occasion for non-payment of support, and 3) that K.D. consistently attended O.H.'s school affairs, met with her teachers, covered O.H. with health insurance, made sure she obtained medical, dental and eye care. Superior Court Opinion, Petition at App. A, page 11a (quoting Trial Court Opinion at 74-75). O.H. testified that K.D. was like a dad to her, and she had feelings for him as a dad. *Id.* Both courts concluded that Petitioner "tacitly consented" to K.D. performing parental duties for O.H. and that Petitioner offered no argument against that, or the support K.D. was providing, until days after the Mother's death. *Id.*

Petitioner simply does not address the fact that the Mother had been in an abusive first marriage with Petitioner, held a Protection From Abuse Order against him, and wished her child to be raised by K.D. after her death.

Petitioner also does not address the fact that he did not object to K.D.'s mother-in-law, S.D., also a third party, having standing *in loco parentis* and consented to her having partial physical custody of O.H.

Finally, Petitioner does not address at all the child's wishes in this case. While we do not advocate that a child's wishes should be more important than a fit parent's wishes, we believe that a child has constitutional, fundamental rights as well as a parent. "Cases like this do not present a bipolar struggle between the parents and the State over who has final authority to determine what is in a child's best interests. There is at a minimum a third individual, whose interests are implicated in every case . . .—the child." *Troxel* at 86 (Stevens, J. dissenting). The best interests standard used by many states including Pennsylvania weighs all of the interests implicated in a complex custody battle, not just one. *Troxel*'s multiple concurrences and dissents illustrate that the Justices of this Court were highly divided on what issues should have been decided by the plurality, if at all. One thing, however, came across clearly from all: no one advocated that an actual harm standard should be adopted, as is being proposed by Petitioner.

CONCLUSION

The Petitioner failed to properly raise in the state courts below the issues he now wishes this Court address. As such, the lower state courts were unable to pass upon the issues raised by Petitioner.

Further, the repeated misstatement of numerous facts and the sound legal reasoning upon which the trial court based its determination, combined with the Pennsylvania Superior Court's opinion affirming the trial court's conclusions fails to establish a sound basis upon which federal constitutional issues should be addressed, especially since those issue were not raised or addressed by the parties or the lower state courts.

Based on the foregoing, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted:

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No. 10-204

In the Supreme Court of the United States

E.S.H.,

Petitioner,

v.

K.D. AND S.L.C.,

Respondents.

On Petition for Writ of Certiorari to the Superior Court of Pennsylvania

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* CENTER FOR ARIZONA POLICY, CITIZENS FOR COMMUNITY VALUES, CORNERSTONE ACTION, CORNERSTONE FAMILY COUNCIL, FAMILY ACTION OF TENNESSEE, FAMILY FOUNDATION, INDIANA FAMILY INSTITUTE, GEORGIA FAMILY COUNCIL, LOUISIANA FAMILY FORUM ACTION, MASSACHUSETTS FAMILY INSTITUTE, MINNESOTA FAMILY COUNCIL, NEW JERSEY FAMILY POLICY COUNCIL, NORTH CAROLINA FAMILY POLICY COUNCIL, OKLAHOMA FAMILY POLICY COUNCIL, PENNSYLVANIA FAMILY INSTITUTE, AND WISCONSIN FAMILY ACTION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

On August 16, 2010, *amici curiae*, Center for Arizona Policy, Citizens for Community Values, Cornerstone Action, Cornerstone Family Council, Family Action of Tennessee, Family Foundation, Indiana Family Institute, Georgia Family Council, Louisiana Family Forum Action, Massachusetts Family Institute, Minnesota Family Council, New Jersey Family Policy Council, North Carolina Family Policy Council, Oklahoma Family Policy Council, Pennsylvania Family Institute, and Wisconsin Family Action, as required by Sup. Ct. R. 37.2(a), notified both Petitioner's counsel and Respondents' counsel of its intent to file this brief *amici curiae*. Petitioner's counsel consented to this filing, but Respondents' counsel did not. Consequently, *amici* move this Court, pursuant to Sup. Ct. R. 37.2(b), for leave to file this brief of *amici curiae*.

Amici, as described below, are not-for-profit organizations that seek to benefit families and children through public policies favorable to the family. They are concerned about the effect on families of caselaw that allows the parental rights of fit, natural parents to be divested by third parties since this undermines a fundamental building block of our society. Numerous of the *amici* organizations produce reports and regularly advocate before state and local governments regarding policies affecting the family.

Amici request leave to file this brief to communicate their concern that the decision of Pennsylvania's courts has created a dangerous departure from our history of constitutionally protected parental rights. Given the work of *amici* and their perspective from particularized experience advocating for families and children, this Court should grant leave to file this brief of *amici curiae*.

Respectfully submitted,

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INTEREST OF *AMICI*[1]

Amici are numerous tax-exempt organizations with memberships in various states that share a common concern over policies that impact the family. In particular, these organizations recognize that the bond between parent and child is essential to our society and is undermined when fit parents are divested of their parental rights. They wish to emphasize that our laws should uphold, as they have historically done, the fundamental right to parent one's children. Many of the *amici* regularly advocate in state and local government for policies that impact the family. Their collective work has included policy reports, education, testimony before governmental bodies, and litigation. *Amici* submit this brief in support of Petitioner, E.S.H.

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has authored this brief in whole or part, and that no person or entity, other than one of the *amici*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of *amici's* intention to file this brief. Petitioner's counsel consented to this filing, but Respondents' counsel did not.

SUMMARY OF ARGUMENT

The U.S. Supreme Court must grant certiorari and reverse the judgment of the Pennsylvania Superior Court because that court's decision directly conflicts with precedent from this Court that recognizes the fundamental right to the care and custody of one's child. Despite this Court's precedent and the rights inherent in the U.S. Constitution, an involved and loving father lost his fundamental right to the care and custody of his child to a legal stranger. This was a direct result of Pennsylvania courts establishing a new "flexible" standard for determining *in loco parentis* status that is "dependent on the facts of the case." This "standard" is no standard at all and lacks any protection for fit, natural parents to prevent their parental rights from being divested by third parties. Under the new "standard" established by Pennsylvania courts, *in loco parentis* status can be established by *any* adult that has provided care for a child. This is a clear violation of *Troxel v. Granville*, 530 U.S. 57 (2000).

Not one natural parent is safe from potentially having their fundamental rights surrendered to a third party. Allowing fundamental rights to be violated in this way will undermine the bond between parents and their children and lead to a breakdown of family, which is an indispensable building block of society. Parental rights constitute a zero-sum game—if primary custody is given to a new party, then the existing parent's rights must necessarily be divested. This is more than an issue affecting the

rights of parents, because children's interests are best served when they are in the custody of their natural parents, when there is certainty in this arrangement, and when third party interference is minimized. For these reasons, certiorari should be granted to prevent Pennsylvania's new *in loco parentis* standard from undermining the constitutional rights of fit, natural parents.

ARGUMENT

I. It is a violation of a fit, natural parent's well established, constitutionally protected fundamental rights to have those rights divested in favor of a legal stranger.

Eric and Karen Harner divorced when their daughter, O.H., was three years old. Primary custody was awarded to the Mother although both parents remained active and involved in O.H.'s life. Mr. Harner saw O.H. on a weekly basis. The Mother began to cohabitate with Kent Deeter, and they eventually married. Shortly thereafter, the Mother passed away.

Mr. Deeter sought and was awarded *primary* custody against the wishes of Mr. Harner, the natural father. Mr. Harner has always been involved in O.H.'s life and never consented to Mr. Deeter assuming parental duties. Mr. Harner was obviously in no position to put a stop to the remarriage of O.H.'s mother or to prevent the inevitable role Mr. Deeter would play in O.H.'s life. Nevertheless, Mr. Harner's fundamental right to the care and custody of his daughter must trump the secondary interests of a legal stranger. The present, bizarre outcome, where a fit, natural parent was awarded only partial custody of his daughter while a legal stranger was awarded primary physical custody, is a result of Pennsylvania's new *in loco parentis* standard that undermines the fundamental rights of natural

parents while recognizing any and every competing interest in the child from third parties.

In its decision affirming the grant of custody to Mr. Deeter, the Pennsylvania Superior Court held that the presumption that a child's best interest is served by maintaining family autonomy "must give way where the child has established strong psychological bonds with a person who, although not a biological parent, has lived with the child and provided care, nurture, and affection, assuming in the child's eyes a stature like that of a parent." *K.D. v. E.S.H.*, 990 A.2d 57 (Pa. Super. 2009) (table) (text at Petitioner's Appendix, 8a) (quoting *J.A.L. v. E.P.H.*, 682 A.2d I314, 1319-1320 (Pa. Super. 1996)). The Court went on to hold that this standard is "flexible and dependent on the particular facts of the case". *Id.* at 9a. Astoundingly, there is no requirement that a parent be unfit before their rights are divested. This type of standardless divestiture of parental rights is in direct conflict with the fundamental right to the care and custody of one's child.

The alarming effect of this decision is not limited to situations where there has been a death in the family. Under Pennsylvania's caselaw, there is no limit to who may be deemed a parent and given primary custody. Mr. Deeter would have still been eligible for *in loco parentis* status if he and the Mother were merely cohabitating and never married. Moreover, if Mr. Deeter remarries, his new spouse could be eligible for parental rights under this standard. In fact, this standard would

have allowed Mr. Deeter to seek custody against the Mother.

In Pennsylvania, *not one* fit, natural parent is now immune from a potentially limitless number of claims by third parties. Any law, whether caselaw or statutory, divesting natural parents' rights must have standards so that those fundamental rights are not undermined. More importantly, any standard governing custody must start with the presumption that a fit, natural parent's right to custody will not be trumped by a third party. Any other standard serves to undermine this well-established fundamental right.

The vague standard created by the Pennsylvania courts is a violation of Mr. Harner's fundamental right to the care and custody of his child, which has been recognized by the Supreme Court time and again. Most recently in *Troxel*, this Court affirmed the constitutional right of a parent to raise their child. The Court stated:

> [I]n *Meyer v. Nebraska*, 262 U.S. 390, 399, 401, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own..." We returned to the subject in *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), and again confirmed that

> there is a constitutional dimension to the right of parents to direct the upbringing of their children. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.*, at 166, 64 S.Ct. 438.

Troxel, 530 U.S. at 66.

As highlighted above, parents have the right to direct the upbringing of their children, control their education, and prepare them for life's obligations. Indeed, the home is the foundation of democracy for it is there that children begin to formulate ideas about who they are, how they relate to others, and how to solve problems. Lynn D. Wardle, *Relationships Between Family and Government*, 31 CAL. W. INT'L L.J. 1, 4 (2000) ("Truly, '[t]he family is the very seedbed of democracy. Home is the place where we get our first ideas about [ourselves], our attitudes toward other people, and our habits of approaching and solving problems.'" (alterations in original)). By allowing an individual such as Mr. Deeter to be treated as a parent and to subsequently acquire *primary* custody, Pennsylvania has divested Mr. Harner of his fundamental rights in the absence of a compelling governmental interest. Mr. Deeter is now able to make decisions concerning the child's medical care, religious upbringing, and moral teachings. If Mr. Deeter begins to cohabitate or

marries and then dies, his new wife similarly stands to make decisions regarding O.H.'s upbringing. If they later separate, then under the court's standard, the new wife would be able to seek custody of the child thereby further undermining Mr. Harner's parental rights.

The Supreme Court has recognized that the fundamental right of parents to the custody, care, and nurture of their child is a right that needs freedom from interference. As the Supreme Court noted in *M.L.B. v. S.L.J*, "few consequences of judicial action are so grave as the severance of *natural* family ties." 519 U.S. 102, 119 (1996) (internal citations omitted) (emphasis added). As observed in the long line of cases cited in *Troxel*, the fundamental right of a natural parent to parental autonomy is well-established. The Court recognized a fundamental right of a fit, natural parent "to make decisions concerning the care, custody, and control of their children." *Troxel*, 530 U.S. at 72. This interest is entitled to heightened protection from interference by third parties. *Id.*

The Court stated:

> In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. *See, e.g., Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) ("It is plain that the interest of a parent in the companionship, care,

> custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements' " (citation omitted)); ...*Parham v. J. R.*, 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course")....

Troxel, 530 U.S. at 66.

An overarching theme of *Troxel* is that legal parents enjoy the right to determine who else should be allowed to interact with their child because interaction with others will influence the moral development of a child. *See* Gary Spitko, *The Constitutional Function of Biological Paternity: Evidence of the Biological Mother's Consent to the Biological Co-parenting of Her Child*, 48 ARIZ. L. REV. 97, 111 (2006) (citing *Troxel*, 530 U.S. at 72 for the proposition that legal parents have the fundamental right to interact with and influence the moral development of their child); Diane L. Abraham, *California's Stepparent Visitation Statute: For the Welfare of the Child, or a Court-Opened Door to Legally Interfere with Parental Autonomy: Where are the Constitutional Safeguards?*, 7 S. CAL. REV. L. & WOMEN'S STUD. 125, 151 ("Not only is parenting a fundamental

liberty interest protected against unwarranted state intrusion (warranted by instances of abuse, neglect or other unfitness of the natural parent), but an attempt to judicially enforce visitation rights by third parties would divide and hamper proper parental authority. Visitation by a nonparent against a natural parent's objection intrudes on parental authority and impression."). This fundamental right also necessarily gives the "constitutional" or "legal" parent a right to decide whether a legal stranger can become a second parent to the child. Spitko, *supra* at 111.

The Supreme Court also noted in *Troxel* that "the parental right stems from the liberty protected by the Due Process Clause of the Fourteenth Amendment." *Troxel*, 530 U.S. at 74. Furthermore, in *Lassiter v. Dep't of Social Services*, 452 U.S. 18, 27 (1981), it was stated that it is "plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'" In *M.L.B. v. S.L.J.*, the Supreme Court noted that "the Court was unanimously of the view that 'the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment.'" 519 U.S. 102, 119. *See also Santosky v. Kramer*, 455 U.S. 745, 754 (1982) ("When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures"); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (the

primary role of parents in the upbringing of their children is now established beyond debate as an enduring American tradition); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (parents have a right coupled with a duty to the freedom to raise their children); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (the Due Process right of parents to "bring up" their children is fundamental).

The Supreme Court has also observed:

> The Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," *id.*, at 503 (plurality opinion); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937).

Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997).

The Supreme Court has recognized substantive protections under the Fourteenth Amendment granting parental autonomy in raising children. It necessarily follows that parents must have physical custody of their children to enjoy the benefit of those rights. This Court has noted that "the child is not the mere creature of the State."

Pierce, 268 U.S. 10, 535. Parental autonomy and its importance in western society is a longstanding tradition that is deeply rooted in our society. *See In re J.P.*, 648 P.2d 1364, 1373-76 (Utah 1982) ("The integrity of the family and the parents' inherent right and authority to rear their own children have been recognized as fundamental axioms of Anglo-American culture, presupposed by all our social, political, and legal institutions.... This parental right transcends all property and economic rights. This recognition of the due process and retained rights of parents promotes values essential to the preservation of human freedom and dignity and to the perpetuation of our democratic society"). It is also noted in *Troxel* that "the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." 530 U.S. at 65.

Troxel emphasizes the following caselaw regarding the importance and history of this right in western civilization:

> *Wisconsin v. Yoder*, 406 U.S. 205, 232, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition").... *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599

> (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Glucksberg, supra*, at 720, 117 S.Ct. 2258 ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the righ[t]...to direct the education and upbringing of one's children" (citing *Meyer* and *Pierce*)).

530 U.S. at 66.

This pertinent caselaw, which was overlooked by the lower courts in the instant action, protects parental autonomy so that it can be free from excessive demands from third parties. It is a violation of the fundamental right to the care and custody of one's child to allow claims of unrelated adults for child visitation (let alone primary custody) when a natural parent is fit. Here there are not even any statutes or caselaw limiting the number of claims or situations where such claims would be appropriate. These claims will subject fit, natural parents to unjustifiable intervention. *See* William C. Duncan, *Waxing State, Waning Family: The Radical Agenda of the American Law Institute*, THE FAMILY IN AMERICA, Winter 2010 at 21 (explaining that parental wishes will become subjected to the competing claims of legal strangers with the expansion of *in loco parentis* and de facto parenting). This will greatly undermine the parental interest in both caring for

the child and in promoting the family as a societal institution.

The problems with the state court's decision granting standing to Mr. Deeter was compounded by its application of a "convincing reasons" test for granting custody. While the court noted that a biological parent has a prima facie right to custody over a third party, the Court then went on to state that this prima facie right could be overcome by a showing of "convincing reasons" to do so. *K.D.* at 10a, 23a. This test, however, falls well short of the standard that this Court has set for awarding custody to a third party over a biological parent.

The law is clear that absent a compelling governmental interest, nothing may interfere with this fundamental right. *Troxel*, 530 U.S. at 65; *See also Hoff v. Berg*, 595 N.W.2d 285, 291 (N.D. 1999) (applying strict scrutiny analysis to custody case). There is no precedent which supports a "convincing reasons" test for infringing with a fundamental, constitutional right. Even if the applicable standard were less than strict scrutiny, this Court has never employed "convincing reason" as the test. Given the well settled case law affirming parental rights as a fundamental right under the Constitution, the standard for infringement should be no less than strict scrutiny of a request to take custody of a child away from a fit biological parent. Here, the state court erred in failing to apply the appropriate standard instead using a far lower standard.

Certainly there are situations where a parent is unfit and divesting that parent's rights appropriately survives strict scrutiny. *See e.g. Santosky*, 455 U.S. at 760 (stating that "*until the State proves parental unfitness*, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship") (emphasis added). However, absent a showing of a compelling governmental interest through lack of fitness, parental autonomy must be protected to preserve the stability of society and promote the ability of the parent to raise and socialize their child without interference. In the instant case, Mr. Deeter's desire for connection with O.H. does not rise to a compelling state interest. Certainly Mr. Harner's fundamental right to the care and custody of his natural child, whose life he has *always* been involved in, should have greater weight than the claim of a legal stranger. The illogical balancing act that puts the rights of a legal stranger ahead of a natural parent cannot be reconciled with Mr. Harner's fundamental rights, and certiorari must be granted.

II. Giving custody to legal strangers threatens societal stability by undermining a foundational pillar of society–the parent-child relationship.

Granting custody to a third party necessarily requires divesting a natural parent of some level of custody. Many parents will not be able to effectively prevent third parties from assuming a parenting role in the child's life—such as here after a divorce occurred. This will lead to the

deterioration of family bonds and will blunt the ability of any single parental figure to model and inculcate those cultural values necessary to be transmitted to the next generation. Exposure to more voices makes any given voice less strong. Our society depends upon parents inculcating values on their children. This aspect of our established social order is undermined when there are a multitude of voices rather than a unified parental voice influencing the child. "Precisely because childrearing means forming the values, interests, ideas, and religious beliefs of the next generation, we should expect American law to insist, as the Supreme Court has, that the state cannot enter the domain of family life." Martin Guggenheim, *What's Wrong with Children's Rights* 25 n.91 (2005). *See also Planned Parenthood v. Casey*, 505 U.S. 833, 926–27 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (observing that the Supreme Court has held that "the fundamental right of privacy protects citizens against governmental intrusion in such intimate family matters as . . . childrearing"). Parental decisions to instill values in children and to expose them to religious training are judgments that "the state can neither supply nor hinder." Guggenheim, 25 n.91 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

Under Pennsylvania law, since *in loco parentis* status is not based on unfitness or even consent, there is an open door for unjustified interference into various parent-child relationships in the state. In *Smith v. Organization of Foster*

Families for Equality & Reform, 431 U.S. 816, 863 (1977) (Stewart, J., concurring), Justice Stewart stated that if "a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on 'the private realm of family life which the state cannot enter.'"

Our culture is defined by the principle that parents take responsibility for their children and that they will act in the best interests of their children. *See Troxel*, 530 U.S. at 68 (explaining there is a presumption that fit parents act in the best interests of their children). Parenting is society's primary means of socializing children, and without parental security from outside demands, the values taught through the parent-child relationship will weaken. *See* Eric G. Andersen, *Children, Parents, and Non-Parents: Protected Interests and Legal Standards*, 1998 BYU L. REV. 935, 946 (1998) (explaining that the moral and cultural values taught through family will deteriorate if the family is subject to numerous outside demands).

Furthermore, we should respect the fundamental right to the care and custody of one's child by requiring a showing of harm before embarking on the vague "best interests" analysis. *See* Elizabeth Weiss, *Nonparent Visitation Rights v. Family Autonomy: An Abridgment of Parents'*

Constitutional Rights? 10 SETON HALL CONST. L.J. 1085, 1131 (2000) (noting that "by requiring an initial showing of harm or parental unfitness before the best interests standard is evoked, parents' childrearing decisions will be subject to minimal judicial second-guessing and the family autonomy protected by the Constitution will retain its intended integrity"). The ability for the natural parent and child to bond is contingent upon upholding the parents' fundamental right to the care and custody over their child.

Not only does the fit, natural parent have a fundamental right to the care and custody of their child, but it has also been recognized that children have a reciprocal constitutionally protected right in the establishment and continuation of the relationship with their natural parents, *without interference.* A child is entitled to constitutional protection from intrusion into the child-parent relationship. *See Troxel*, 530 U.S. at 66 ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected") (citing *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978)); *Santosky*, 455 U.S. at 760 ("until the State proves parental unfitness, *the child and his parents* share a vital interest in preventing erroneous termination of their natural relationship") (emphasis added); *Uhing v. Uhing*, 488 N.W.2d 366, 374-75 (Neb. 1992) (The Constitution "protects not only the parent's right to the companionship, care, custody, and management of his or her child, but also protects the child's reciprocal right to be raised and nurtured by a biological or adoptive parent").

If the parent-child relationship is interfered with, this can only be constitutionally justified with a showing of a compelling state interest, such as likelihood of harm to the child through parental unfitness. *See* David D. Meyer, *What Constitutional Law Can Learn from the ALI Principles of Family Dissolution*, 2001 BYU L. REV. 1075 (2001) (supporting the proposition that a compelling interest often equals a showing that substantial harm has or will occur).

The Pennsylvania standard undermines a stable relationship for both the parent and the child. It is beyond comprehension that in this case that the fit, natural parent was only awarded time with his daughter every other weekend and holidays while a third party, Mr. Deeter, was awarded primary physical custody and gets to raise Mr. Harner's child. Although Mr. Deeter, who was married to the child's mother for 14 months, has played some role in the child's life, it would be an act of social reengineering to suggest that he played a more important role than her *natural* father, who has always been involved in O.H.'s life. To a significant extent, custody rights are a zero-sum game—if primary rights are given to one party, then the other party's rights are divested. *See* Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 87 (1997) (explaining that a legal dispute over a child is a "zero-sum game" and the parent who wins considers himself a "victor in war" while the child may be the loser). Due to the fact that the relationship between natural parent and child

forms the foundation of our society, the *primary* custody rights of a fit, natural parent should not be undermined at the expense of a legal stranger's secondary interest. We must preserve the liberty of our citizens to have a child and know that as long as they remain involved, they will always have a right to parent that child that cannot be limited except by the other natural or adoptive parent.

While *in loco parentis* status can be useful and important in certain circumstances, any statute or common law doctrine must be secondary to the fundamental, constitutionally protected right to parent and that such a status should not be conferred over the objection of a fit, natural parent. Other courts have viewed *in loco parentis* narrowly because they recognize that the fundamental rights of parental autonomy are worth preserving. *See e.g., Powledge v. United States*, 88 F. Supp. 561, 563 (D. Ga. 1950) (explaining that for a statute defining *in loco parentis*, it is likely that by not opening it up to all categories of caretakers "Congress expressed its intention to keep th[e] class of beneficiaries in well defined limits."); *In re Marriage of Santa Cruz*, 527 N.E.2d 131, 139 (Ill. App. Ct. 1988) (the court refused to grant a maternal grandmother standing to request custody where there was insufficient evidence that child's mother had voluntarily relinquished physical custody even though the mother had packed her things and left the child with the grandparent); *In re Custody of O'Rourke*, 514 N.E.2d 6 (Ill. App. Ct. 1987) (a maternal aunt and uncle who would sometimes care for the children did not have standing because the court ruled that when the

mother died, physical custody of the children transferred to their father); Lawrence Schlam, *Standing in Third Party Custody Disputes in Arizona: Best Interests to Parental Rights- And Shifting the Balance Back Again*, 47 ARIZ. L. REV. 719, 745 (2005).

In this case, the Pennsylvania Courts declined to utilize necessary standards but rather allowed Mr. Deeter to assume *in loco parentis* status over the objections of a fit, natural parent—simply because of his relationship with the mother. This is outside of the "well defined limits" intended by other courts and required by constitutional considerations. Our understanding of parental rights is rooted in our nation's history and necessary to our understanding of ordered liberty, and this decision is adverse to those well-established values in western civilization. A similar situation that happened to Mr. Harner could happen to *anyone* unless Pennsylvania is required to adhere to appropriate standards when divesting custody. Because of the lack of necessary standards, fundamental rights and parent-child bonding are in jeopardy, risking further damage to societal stability.

III. Children's interests are best served when third party interference is minimized.

In custody and visitation disputes, children are often collateral damage. It is important that the Courts do not increase the occurrence of this unfortunate reality by expanding the universe of

those who can demand custody. An increase in custody disputes will increase the burden on children who not only must be shuttled around and endure uncertainty in their lives but must witness the animosity between important figures in their lives. For the child's welfare, these instances should be minimized. The fewer people that have standing to challenge custody and visitation, the better off the child will be. *See* Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 86-87 (1997) (noting that the conflicts over the best interest of the child continue to take place in a win or lose framework).

Our society implicitly recognizes the notion that a child belongs to his or her natural parents and that the natural parents have a fundamental right to the custody of their child to prevent children from being "tossed around." *See* Abraham, *supra* at 125, 150 ("If stepparent visitation is ordered over a natural parent's objections, the child is at risk for being placed in the middle of a litigation tug-of-war").

If this decision is allowed to stand, whoever is deemed to be *in loco parentis* and can afford to litigate over parental rights can "buy time" with the child. Furthermore, because of the nature of the adversarial system, the prize fighting attitude in such disputes can sometimes involve extreme accusations and even child coercion. Weinstein, *supra* at 86-87. This environment highlights third parties' self-interest while blatantly disregarding children's vital relationship with their natural

parents. An invasion of this relationship comes at a cost. *See Troxel*, 530 U.S. at 64 (observing that "the State's recognition of an independent third-party interest in a child can place a substantial burden on the traditional parent-child relationship").

As noted in *Troxel*, the "demographic changes of the past century make it difficult to speak of an average American family." 530 U.S. at 63. The unfortunate reality in a country with high divorce rates and single parent families is that children relocate often. It is in a child's best interest to live with her fit, natural parent and be free from interference. This has been consistently recognized in the law. Indeed, "American society has always given great weight to the parent-child relationship, and, in general, our culture has accepted the principle that important decisions about the custody and control of children should be left in the hands of natural parents." Guggenheim, *supra* at 18.

Children, whose interests are vitally important, have no standing to bring an action and have only a muted voice in proceedings dealing with their family relationships. *See* Sarah H. Ramsey, *Constructing Parenthood for Stepparents: Parents by Estoppel and De Facto Parents Under the American Law Institute's Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 285, 286 (2001). Since children are not truly in a position to advocate their own interests, our laws must recognize that it is best that third party interference be minimized. Third party interference subjects the child to multiple

competing claims, lack of bonding with their natural parents, disputes between the adults in their lives, and being shuffled around. In these complex situations, protecting the fundamental right of the fit and involved natural parent also serves the child.

The Supreme Court stated in *Parham v. J.R.*, 442 U.S. 584, 602 (1979), and reaffirmed in *Troxel*, 530 U.S. at 68, that "historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children." Furthermore, the child has a reciprocal right in the continuance of the relationship with their natural parent absent the rebuttal of the fitness presumption. *See Uhing*, 488 N.W.2d at 374-75 (noting that the "establishment and continuance of the parent-child relationship 'is the most fundamental right a child possesses to be equated in importance with personal liberty and the most basic constitutional rights'" (citing *Johnson v. Hunter*, 447 N.W.2d 871, 876 (Minn. 1989))). It is a violation of the parent's rights *and* the child's rights to award primary custody to a third party without a showing of unfitness.

In the instant case we have an involved, natural father who objects to surrendering his parental rights. In *Troxel*, the Supreme Court noted the presumption "that natural bonds of affection lead parents to act in the best interests of their children." 530 U.S. at 68 (quoting Parham, 442 U.S. at 602). *See also* William C. Duncan, *De Facto Parents*, NAT'L REVIEW ONLINE, Aug. 31,

2009[2] (explaining that biological ties "increase[] the likelihood that the parents would identify with the child and be willing to sacrifice for that child, and it would reduce the likelihood that either parent would abuse the child"). The ability of a natural parent to bond with their child is essential in a relationship that has been recognized as fundamental in our society. It is important for the welfare of children, that their bonding with their natural parents not be disturbed. Every other weekend and holidays, which is all that was awarded to Mr. Harner, is simply not enough time to foster the vital biological parent-child relationship.

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[2] Available at http://article.nationalreview.com/404642/de-facto-parents/william-c-duncan.

CONCLUSION

This Court has repeatedly affirmed the fundamental rights of parents to raise their children without interference. The cases on this point are legion. Nevertheless, Pennsylvania courts, as evidenced by the decision in this case, have held this fundamental right to be subservient to a nebulous "flexible" *in loco parentis* doctrine, which the state court held would be defined based on the facts of each specific case. This holding is directly contrary to this Court's well-established precedent and is a blatant infringement on an important right, one that is critical to the stability and health of the family and our society, and cannot be allowed to stand. Parental rights constitute a zero-sum game---if primary custody is given to a new party, then the existing parent's rights must necessarily be divested. Moreover, this is more than an issue affecting the rights of parents, because children's interests are best served when they are in the custody of their natural parents and third party interference is minimized. It is imperative, therefore, that this Court grant certiorari and reverse the judgment of the Pennsylvania Superior Court establishing clearly that the rights of a fit, natural parent may not be infringed upon.

Respectfully submitted,

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